87-1514

No. ______

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARMCO INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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BERNARD J. CASEY
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QUESTION PRESENTED

Petitioner Armco purchased for $100,000,000 a failing coke plant close by its Ashland, Kentucky basic steel production works. Armco made the coke plant a department of the steel works and its sole source of coke, hired the coke plant employees, including the many who had lost their jobs, integrated coke production into the continuous steel producing process, and accreted the coke department employees into the larger single Ashland Works bargaining unit represented by the Steelworkers Union. The question presented is:

Whether the decisions of the National Labor Relations Board and the Court of Appeals, which conflict with fifty years of unbroken precedent, properly compel petitioner Armco, alone among all domestic basic steel manufacturers, to recognize two bargaining units for production employees in a functionally integrated steel manufacturing plant, thereby (1) giving employees in the coke department unfair leverage over the production in all other departments and (2) defeating the basic purpose of the coke plant purchase and, as a precedent, discouraging investments to resuscitate declining American basic industries.

PARTIES TO THE PROCEEDING AND LIST OF SUBSIDIARIES AND AFFILIATES

Petitioner Armco was a petitioner in the Court of Appeals and a respondent before the National Labor Relations Board. Also a petitioner in the Court of Appeals and respondent before the Board was the United Steelworkers of America, AFL-CIO. The National Labor Relations Board was a respondent in the Court of Appeals and Oil, Chemical and Atomic Workers International Union was an intervenor in that court.

Armco Inc. owns in part or is affiliated with the following companies: Acerex; Aceros Del Sur S.A. ; Armco Columbo S.P.A.; Armco Equipetrol S.A.; Armco Industrial S.A.; Armco Instapanel S.A.; Armco Moly-Cop S.p.A.; Armcopaxi S.A.; Armco Peruana S.A.; Australian Steel & Mining Corporation Pty. Ltd.; Black River Lime Company; Bundy Venezolana C.A.; Control International, Inc.; D.I.F.S.I.C.A; Charles Fulton Holdings Ltd.; Charles Fulton Pty. Ltd.; Charles Fulton Sendirian Berhad; Charles Fulton 1982 Ltd.; Inmobiliara Hierro y Accro, S.A.; Metaltubos C.A.; Northern Land Company; Obras Civiles e Industrias C.A.; Productos Metalicos Armco S.A.; Prolansa (Productora de Alambres y Derivados S.A.); Reserve Mining Company; Torcad Limited; Winning Post Investment Ltd.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Armco Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-16a) is reported at 832 F.2d 357. Copies of the opinion of the National Labor Relations Board (279 NLRB No. 143, May 30, 1986) and of the opinion of the administrative law judge, which are not yet officially reported, are lodged with the Clerk of this Court.

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1987. Timely petitions for rehearing

were denied on February 4, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent portions of Sections 8(a)(1), (2), (3), (5), (8)(d) and 9(c)(5) of the National Labor Relations Act, as amended, 29 U.S.C. §§158(a)(1), (2), (3), (5), 158(d) and 159(c)(5) are set forth at App. 17a.

STATEMENT OF THE CASE

On December 31, 1981 Armco Inc. purchased from Allied Corporation for $100,000,000 a coke facility that the latter corporation had been operating at a loss in Ashland, Kentucky, and was about to close. Armco had been operating a nearby basic steel producing plant in Ashland—the Ashland Works—for many years, and proposed to integrate the coke facility into the Ashland Works. This would permit operating efficiencies and would ensure a steady supply of coke for the steel works. Because Armco's blast furnaces are highly vulnerable to an interruption of their supply of coke, without the reliability of supply and quality provided by an integrated coke department Armco needed to stockpile its inventory of coke, an inefficient, wasteful practice.[1]

[1] Depending on the level of supply, demand, and likelihood of work stoppage at any given time, Armco would stockpile between one and three months supply of coke. In 1983, at the time of the hearing, a month's supply of coke was valued at $7,000,000. Since the creation of the Ashland Works coke department, which afforded a predictable and uniform quality of coke to the blast furnaces, Armco has been able to reduce its coke usage by about 150 lbs. per ton of hot metal produced. This has resulted in a savings in blast furnace operating costs of $35,000 to $45,000 per day at assumed daily operating levels of 4800 (the operating level at the time of the hearing) to 6200 tons per day (the furnaces' capacity).

At the time of the purchase, Allied employees were represented by the Oil, Chemical and Atomic Workers International Union and its Local 3-523 (OCAW). There were then approximately 130 employees working at the failing coke facility, which was operating at 15% capacity. Approximately 250 additional hourly employees were on lay-off at the time, with no prospect of recall by Allied. Employees at the Ashland Works numbered approximately 3700 prior to the purchase and they were represented by the United Steelworkers of America and its Local 1865 (USWA).

Upon the takeover of the Allied facility by Armco, it became the coke department of the Ashland Works and was integrated into the continuous steel producing process. The coke department employees were accordingly accreted into the existing USWA Ashland Works bargaining unit. Full integration of the operations and of the bargaining unit was a central, overt object of the purchase. All involved parties—Armco, Allied, USWA, OCAW—were aware of this prior to the purchase. Armco and USWA representatives believed they had an understanding with the president of OCAW International that with the sale of the coke plant OCAW would cede its bargaining rights for coke plant workers to USWA. The OCAW president denied making a commitment for an unequivocal release of the coke workers,[2] but he acknowledged that OCAW decided not to challenge Armco's known intention to accrete the coke department workers into the USWA unit until the sale and integration were *de facto* events. OCAW decided not to alert Armco to its al-

[2] The administrative law judge credited the OCAW president's testimony on this point.

leged objections at that time because it did not want Armco to consider its option of replacing the existing coke plant employees with new employees.[3]

On April 20, 1982, more than three months after Armco had hired all of the coke plant employees and integrated them into its steel manufacturing operation, OCAW International filed a charge against Armco asserting that Armco unlawfully recognized USWA and should have recognized OCAW as the bargaining representative of the coke department employees. In June, 1982, a parallel charge was filed against USWA. In May, 1983, the General Counsel of the National Labor Relations Board issued a complaint embodying these allegations.

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[3] This decision was discussed by the president of OCAW International in a letter to the members of the OCAW Local dated March 18, 1982:

> An employer purchasing a plant from another employer does not have to recognize the bargaining contract which existed between the Union and the seller. If the purchaser hires a majority of the employees who were members of the Union, such purchaser might have to negotiate with the Union that represented the employees prior to the sale. This is not true in every situation because *if the plant is purchased and becomes a part of the overall purchaser's operations, that purchaser may have to negotiate with the Union that represents his employees.*
>
> *The International Union has every reason to believe that had the [OCAW] International Union raised a question of representation rights prior to your being hired by Armco then Allied Chemical Corporation would have closed the plant down and laid everyone off thus freeing Armco to hire new employees rather than members of OCAW. (Emphasis added). (ALJ op. 39)*

The production of coke is now the first step in the continuous manufacturing process for the production of steel at the Ashland Works as it is in each of the many steel works which operate with an integrated coke plant.[4] The Ashland Works now is totally dependent on its own coke department for its coke supply. In contrast, prior to the purchase of the coke facility Armco's reliance on Allied for its coke needs varied from year to year and was far less than total.[5]

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[4] The manager of human resources at the Ashland Works testified to the "fiddle-string tight" nature of this continuous process:

> From the coke plant to the coiler on the hot strip mill, is what we would call a continuous process. We try—and the most efficient way to operate, is to try to operate without stopping any part of that process in the way, or cooling the product, or of wasting energy in any way at that point, by cooling it and inventorying it for instance, would be another inefficiency in the process, if we had to inventory between any one of these points.
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> * * * * *
>
> So that whole operation from—literally from the coke plant to the coiler at the hot strip mill, is strung together fiddle-string tight, as far as a process is concerned.
>
> The closer we can keep that integrated, the more efficient we can—the more efficiently we can operate there. (T. 390-391)

[5] During the five years immediately preceding the purchase the Ashland Works acquired, on average, only 39% of its coke from the Allied plant. In 1981, the last year of the coke facility's operation by Allied, it supplied only 14% of the coke needs of the Works. Until 1982 Armco operated coke batteries in Hamilton, Ohio, which supplied some of the Works' coke, but after the purchase of the Allied facility Armco closed the Hamilton

The coke department operates under centralized plant-wide management and labor relations policies. Its superintendent has exactly the same degree of authority as do the superintendents of the 16 other operating departments of the Ashland Works. Like them, he reports to an area superintendent (coke department, blast furnace department, basic oxygen department, foundry department) and he has operating responsibility only. The coke department maintenance function is the responsibility of the Works maintenance forces, as is the case with respect to all of the operating departments. All employment, personnel and labor-related responsibilities are consolidated in the Works staff under the general supervision of the manager of human resources for the Works. Of course, the facility no longer has an independent economic purpose or role. Its economic contribution is subsumed in that of the Works as a whole.

In short, under Allied ownership the coke facility was a "plant" for Board unit determination purposes. It no longer is so. It is now one of several departments of a fully integrated steel producing plant at the highly strategic front end of the continuous steel manufacturing process.

Despite the fundamental transformation and total integration of operations that took place when the failing Allied plant was purchased by Armco and converted into the Ashland Works coke department, the administrative law judge ruled that the coke department was a bargaining unit separate from the bargaining unit for the rest of the production employees

batteries, and since then has relied exclusively on its own coke department as the Works' coke source.

at the Ashland Works, and that Armco therefore violated §§ 8(a)(1), (2), and (5) and 8(d) of the Act by recognizing USWA and not recognizing OCAW as representative of the coke department employees and by applying the USWA-Armco contract to the coke department employees.[6] The Board affirmed the decision of the ALJ (279 NLRB No. 143). The Court of Appeals affirmed the Board, except for a backpay order.

REASONS FOR GRANTING THE WRIT

The decision of the court below conflicts with fifty years of legal precedent and constructive practical experience by which the production line employees of functionally integrated basic steel plants have been organized in single bargaining units. By permitting the employees in petitioner Armco's Ashland Steel Works' newly acquired coke department to organize as a separate bargaining unit, the decision awards to a small group of employees at the front end of the production process a stranglehold over all production, and thus over the livelihood of the vast majority of the employees and the economic success of the entire enterprise. The Court of Appeals conceded the existence of this destructive whipsaw potential—it recognized "the possibility of unfair leverage" (App. at 15a)—but it dismissed it as irrelevant when in fact it is at the center of the case. The court's decision rests on a backward looking analysis of what the situation had been when the coke facility was a separately owned entity which had failed, and brushes aside the

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[6] The ALJ also held that Armco violated § 8(a)(3) "by requiring coke plant employees to execute Steelworkers dues checkoff and authorization cards as a condition of employment"

constructively radical changes the acquisition by petitioner Armco brought in the coke employees' circumstances. These included restoration of the jobs and productive capacity of the coke facility and establishment of entirely new economic dependencies by integration of the coke facility with the entire steel works, all brought about by the Company's willingness to invest huge sums for the very purpose of creating those changes. The decision is thus profoundly hostile both to investment in domestic heavy industry and to the radical changes needed to revive it. It destroys the basis on which Armco sought to strengthen a major steel producing facility and thus help counter the heavy forces of contraction sapping the domestic steel industry in particular and national industrial production in general. Finally, the decision not only puts Armco at a distinct competitive disadvantage in the steel industry but also as a precedent it will encourage the socially undesirable consequence of fostering employee terminations as a condition precedent to many business takeover transactions. For these reasons the decision is not only erroneous, it is also highly significant and worthy of review by this Court.

1. Consonant with the transformation of the nearly extinct Allied plant into a vital department of the Ashland Works in totally new economic circumstances and with the full integration of the coke department into the steel production process of the Ashland Works, Armco accreted the coke department employees into the much larger existing single Ashland Works bargaining unit represented by USWA.[7] In

[7] The Board has often found accretion to be appropriate par-

doing so, Armco followed the lead of unbroken legal precedent and a long history of practical experience by which the production employees in basic steel and other manufacturing industries have invariably functioned as a single bargaining unit. The ruling of the Court of Appeals, upholding the NLRB, that the coke department is a separate appropriate unit from the rest of the Ashland Works squarely conflicts with well-established principles governing unit determinations in basic steel and other manufacturing industries.

In basic manufacturing industries characterized by a continuous production process such as the Ashland Steel Works, functional integration is and has always been the key determinant in unit appropriateness analyses. Bargaining units comprising one component of the production process have consistently been regarded as inappropriate.[8] There is no case in the more

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ticularly where, as here, a relatively small group of employees previously represented by another union has been acquired and become integrated by the new employer into its own larger operations. See, e.g., Martin Marietta Chemicals, 270 NLRB 821 (1984); Boston Gas Co., 235 NLRB 1354 (1978); Indiana Bell Tel. Co., 229 NLRB 187 (1977); Lansing General Hospital, 220 NLRB 1 (1975); Border Steel Rolling Mills, 204 NLRB 814 (1973); Joseph Cory Warehouse, Inc., 184 NLRB 627 (1970); Firestone Synthetic Fibers Co., 171 NLRB 1121 (1968); Federal Electric Corp., 167 NLRB 469 (1967); Humble Oil & Refining Co., 153 NLRB 1361 (1965); Granite City Steel Co., 137 NLRB 209 (1962).

[8] See, e.g. Continental Web Press, Inc. v. NLRB, 742 F.2d 1087, 1090-91 (7th Cir. 1984); Noranda Aluminum, Inc., 186 NLRB 217, 218 (1970); Alcan Aluminum Corp., 178 NLRB 362, 365 (1969); Geneva Steel Co., 57 NLRB 50, 55-56 (1944); Sheffield Steel Corp. of Texas, 43 NLRB 956, 959 (1942); Tennessee Coal, Iron & R.R. Co., 39 NLRB 617, 623-24 (1942); National

than fifty years of the Act's history which has approved a bifurcated unit of production line employees in the steel industry, or any manufacturing industry, where operations were functionally integrated. There are both economic and practical reasons for this. Collective bargaining is at its heart an economic exercise. It is the means by which an employer's employment costs are resolved in a unionized setting. Bargaining unit structures reflect this economic reality. In industries like basic steel in which a high degree of integration and mutual interdependence of operating units is the norm, the controlling economic reality is that all participants in the enterprise contribute to, and are bound by, a single, unitary plant-wide economy. Hence, bargaining units in such industries are also uniformly unitary and plant-wide.

From the practical perspective, a small group of employees at one stage of the continuous production process, such as the coke workers here, would, if they belonged to a separate bargaining unit, be able to exercise undue leverage over the total production process. A strike by the coke workers in pursuit of their own objectives could shut down the entire operation, leaving all Ashland production employees without work and gravely damaging the prosperity and prospects of the entire enterprise. The Court of Appeals for the Fourth Circuit was highly sensitive to this "stranglehold" problem in rejecting a separate unit for a group of calcite workers in an integrated stone quarry operation:

> Because of the integrated and interdependent nature of the Texas operations a labor dis-

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Tube Co., 33 NLRB 1248, 1251-52 (1941); Wheeling Steel Corp., 8 NLRB 102, 108 (1938).

> pute at calcite would undoubtedly severely disrupt the operations of the remaining facilities, causing economic hardship to employees not involved in the dispute but dependent upon the uninterrupted functioning of the quarry operation. This is neither the encouragement of stable collective bargaining nor is it collective freedom of choice as contemplated by the Act.

NLRB v. Harry T. Campbell Sons' Corp., 407 F.2d 969, 979 (4th Cir. 1969). The Court of Appeals for the Seventh Circuit took the same strong stand in *Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1090-1091 (7th Cir. 1984):

> It is costly for an employer to have to negotiate separately with a number of different unions, and the costs are not borne by the employer alone. The different unions may have inconsistent goals, yet any one of the unions may be able to shut down the plant (or curtail its operations) by a strike, thus imposing costs on other workers as well as on the employer's shareholders, creditors, suppliers, and customers.
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> * * * * *
>
> Like Continental Web we find it difficult to understand why there should be separate units for pressmen and preparatory employees. . . . It is as if the Board had said that the workers at the beginning of an assembly line belong in a different bargaining unit from the ones at the end; for preparation and printing are successive stages in a single lithographic production process.

In the instant case, the Sixth Circuit acknowledged the "unfair leverage" problem but, in conflict with

the Fourth and Seventh Circuits, set it aside as if it were irrelevant to, or at best an unavoidable incident of, its holding. In fact it is at the core of the issue and is the fundamental reason that the Board's separate unit determination should have been overturned.

In essence, then, the Court of Appeals held, in conflict with all precedent, that two "appropriate" bargaining units may co-exist on one continuous production line.

2. Denigrating the critical factor of a single highly integrated and closely interdependent production process, the court's separate unit argument pivots on such subsidiary or irrelevant matters as the prior bargaining history when the employees were part of a separate and failing enterprise, a snapshot view of employee interchange, use of the same machinery as when Allied owned the coke facility, different skills of coke employees from those utilized at other stages of the production process, and a separate telephone exchange, credit union and time clock. App. at 10a-13a.

In subordinating the critical fact of functional integration to these marginal or irrelevant factors, the court relies on precedent relating to restaurant chains and grocery warehouses[9], which are in no sense comparable to a continuous production line in a manufacturing setting. Although restaurants and warehouses may experience some degree of functional integration through centralized management and per-

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[9] See Victoria Station, Inc. v. NLRB, 586 F.2d 672 (9th Cir. 1978) (cited at App. 11a; 2 of 7 restaurants); NLRB v. American Seaway Foods, Inc., 702 F.2d 630 (6th Cir. 1983) (cited at App. 11a; grocery warehouse).

sonnel policy, there is, unlike the production line, no substantial functional interdependence which would necessarily shut down one unit because of trouble in another unit. The court thus relies on factually inapplicable precedent while ignoring the extensive authority which applies directly to the manufacturing sector and which uniformly finds separate bargaining units inappropriate for a continuous production operation such as basic steel.[10]

3. The ruling below misconstrues and thus dismisses the economic factors which are central to the "community of interest" analysis underlying the bargaining unit question. Unit appropriateness questions

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[10] A separate unit is highly disfavored where "any work stoppage [in the proposed separate unit] is likely to have an immediate and adverse impact on the Employer's production operations." Motor Wheel Corp., 234 NLRB 358, 361 (1978); Noranda Aluminum, supra; Sheffield Steel Corp., supra, 43 NLRB at 959. The Board has consistently placed substantial reliance upon integration and interdependence of operations in denying requests for separate units in manufacturing industries. See, e.g., La-Z-Boy Chair Co., 235 NLRB 77, 78 (1978) ("[e]mployer's production process is functionally dependent upon the work of the tool-and-die employees"); E.I. DuPont de Nemours & Co., 205 NLRB 552, 554 (1973) ("high degree of functional integration between the sulphuric acid department and the operations of the entire plant"); U.S. Plywood-Champion Papers, Inc., 174 NLRB 292, 295 (1969) (where the proposed separate department was "an inseparable part of an integrated and functionally interdependent continuous flow production process"); Radio Corp. of America, 173 NLRB 440, 445 (1968) ("employees in the units sought. . . are highly integrated into the production output of the Company"); Mobil Oil Corp., 169 NLRB 259, 261 (1968) ("high degree of integration . . . between the powerhouse function and the storage and distribution operations").

are to be decided on the basis of whether there exists a "community of interest" in the proposed unit which is sufficiently separate and distinct from the broader unit to justify an independent entity for collective bargaining purposes. *Continental Web Press, Inc. v. NLRB, supra.* The acquisition of the coke plant in December 1981 brought about a full integration of operations which, in turn, wedded the interests of the coke department employees to the Ashland Steel Works and the domestic steel industry. The Court of Appeals failed to accord *any* significance to this vital change in circumstance which is the soul of the community of interest argument. Instead of recognizing the economic arguments as fundamental, the court dismissed them as matter pled in extenuation and mitigation, as a plea for "leniency." App. at 15a.

The court below saw *no* changes of any substance brought about by the sale of the coke plant. "The only real change has been an increase in production, a change which does not alter the nature of the employing industry." App. at 11a. The court thus completely disregarded the palpable and critical economic difference between a self-standing coke plant and a coke department of a steel works whose operation is an integral part of the steel making process. In the one instance the facility has its own economic mission, the production of quality coke at a cost which permits the facility to maintain its place in the market. This independent economic mission automatically gives rise to a community of interest in the persons associated in the enterprise. Their joint economic futures depend upon the preservation of a viable enterprise. For this reason, the coke facility was an appropriate unit when it was under Allied ownership. When Armco acquired

the coke facility that economic fact of life, which gave coherence to the coke unit in Allied's hands, disappeared, merging into the broader sphere of interest endemic to the steel works as a whole. Coke workers, like steelworkers, now make their contribution to the entire Works' economy. Their economic rewards and security rise or fall with the result achieved by the Works in the marketplace for steel products. In consequence, any bargaining between Armco and representatives of its coke department employees is governed by wholly different economic considerations than were the negotiations under Allied ownership. Now, the controlling economic factors which apply to all Works employees relate to the economic performance of the entire Works, not to that of any particular operating component of the Works. In brushing aside these crucial points, the Court of Appeals never examined the propriety of an independent unit for coke department employees specifically in the light of the circumstances now prevailing in the Company and industry in which those employees are now employed. It merely assumed that, because the employees involved were still engaged in the production of coke, there had been no changes of any consequence.

Instead of recognizing the dramatically new economic circumstances and personal goals, expectations, dependencies and allegiances created by the revival of the coke plant and its integration into the steel industry, the court looked backward to the defunct bargaining history between coke employees and their former employer, Allied. Past bargaining history may, of course, be considered in a unit determination context if it is currently reflective of a viable working relationship between the parties. But past bargaining

history is not relevant to a present unit determination involving a different employer, a different industry, and a different galaxy of economic interests and concerns.[11]

4. The rulings below undermine the basic purpose of Armco's acquiring and integrating the coke plant. Armco's $100,000,000 investment was intended to provide economic rationality to the operations of both the coke plant and the steel works. As a free-standing entity under Allied, the coke plant failed. Without a continuous flow of coke from a coke plant integrated with the steel production process, the steel works sustained the huge costs of the inefficiencies of stockpiling and of uneven coke quality. The acquisition of the coke plant and its subsequent integration into the steel works were undertaken for the purpose of eliminating the inefficiencies contributing to the decline of each. The rulings which we seek to overturn seriously interfere with this goal. By placing Armco—alone among all domestic steel manufacturers—in the vise of a splintered production line bargaining unit, the rulings require Armco to revert to its pre-acquisition, economically wasteful practice of coke stock-

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[11] In a recent successorship case, the Seventh Circuit admonished the Board for focusing too narrowly on the past bargaining history of employees with their former employer:

> A bargaining unit may have been in existence for some time before the change in ownership. However, the issue here is one of successorship, so that the Board must determine whether the unit was appropriate and remains so in the alleged successor. It begs the question to rely on the bargaining history of the predecessor alone . . . NLRB v. Indianapolis Mack Sales & Service, Inc., 802 F.2d 280, 285 (7th Cir. 1986).

piling in order to hedge against "the possibility of unfair leverage" enjoyed by the separately represented coke department at the front end of the production line.

5. As precedent, by conditioning the integration of newly acquired production units on the bifurcation of collective bargaining responsibilities, the rulings below will tend to discourage much needed investment to upgrade, integrate and make more efficient the country's heavy industrial production capacity. In this important respect, the rulings run counter to the reasoning of *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 287-88 (1972), and *Howard Johnson Company v. Detroit Local Joint Executive Board*, 417 U.S. 249, 255, 261 (1974), which encourage investments of capital in domestic enterprises and expect and allow the purchaser of "a moribund business" (406 U.S. at 287) to make substantial operational and other changes. The rulings will also inevitably create an undesirable incentive on the part of similarly situated business purchasers to discharge the acquired company's incumbent employees. As the court below observed (App. at 3), although Armco "decided that the most efficient way" to operate the coke facility was "to integrate [it] into its Ashland Works," it could have chosen either to operate it "as a self-standing unit," or to "[purchase] assets only, allowing the company to hire new labor." The first alternative, of course, would have prevented Armco from obtaining the operational efficiencies of an integrated unit, a basic objective of the transaction. The second course of action—displacing incumbent employees—would, under the court's rationale, have been congruent with Armco's integrated unit objectives but

only at the senseless expense of the incumbent employees. We suggest that a rule of law which compels employers to engage in such socially disruptive conduct in order to achieve entirely lawful and economically desirable ends does not commend itself as a standard for future employer conduct or as an acceptable legal principle.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
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March 12, 1988

APPENDIX

APPENDIX A

Nos. 86-5616/5707/5825/5826

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARMCO, INC. (86-5616/86-5825),
UNITED STEELWORKERS OF AMERICA, LOCAL 1865 (86-5707/86-5826),
Petitioners Cross-Respondents,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent Cross-Petitioner.

ON PETITION for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

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Decided and Filed November 3, 1987

Before: MERRITT and MARTIN, Circuit Judges; and BROWN, Senior Circuit Judge.

BOYCE F. MARTIN, JR., Circuit Judge. Armco, Inc., and the United Steelworkers of America seek review of an order of the National Labor Relations Board finding them guilty of an overly-aggressive organizational effort in violation of the National Labor Relations Act.

This case arises from Armco's acquisition of an Allied Chemical coke plant in Ashland, Kentucky on December 31, 1981. Armco owned and operated a steel production plant only a few miles from the coke plant, and it paid $100 million to Allied with the idea of obtaining a constant and high-quality supply of coke for its Ashland blast furnaces.

The controversy arose from Armco's unilateral decision to accrete the coke plant workers to the Steelworkers' bargaining unit at the steel plant, and from its failure to recognize or bargain with the Oil, Chemical and Atomic Workers (OCAW) which had always represented the workers at the coke plant. This decision resulted in a meeting at which the coke workers were required to sign Steelworkers' dues checkoff cards if they wished to work for Armco. The National Labor Relations Board found that the coke workers represented a separate and appropriate bargaining unit and that Armco's actions constituted unfair labor practices in violation of sections 8(a)(1), (2), (3), and (5), and 8(d) of the National Labor Relations Act, 29 U.S.C.A. §§ 158(a)(1), (2), (3), and (5), and § 158(d). The Board also found that, by its actions, the Steelworkers had violated sections 8(b)(1)(A) and (b)(2) of the Act, 29 U.S.C. §§ 158(b)(1)(A) and (b)(2). This decision appears at 279 N.L.R.B. 143 (May 30, 1986), and it affirms the lengthy rulings of the administrative law judge.

For the reasons that follow, we affirm, and we order that the decision of the Board be enforced.

I. *FACTS*

For approximately 35 years, Allied Chemical Corporation was engaged in the production of coke and its byproducts at the Ashland plant. Since 1952, that plant's employees were represented by the OCAW International Union, its Local 3-523, and OCAW's predecessor. The most recent collective bargaining agreement between Allied and OCAW was effective from August 5, 1979 through May 14, 1982. During

1981, the coke plant produced 500 tons per day, nearly all of which was sold to Armco. But, because the plant's production capacity was 2800 tons per day, nearly two-thirds of the employees had been laid off.

The employees of Armco's Ashland Works had been represented by the Steelworkers since 1942, and their most recent contract was effective from March 1, 1983 through July 31, 1986. During 1981, Armco needed about 2800 tons of coke per day to operate its Ashland Works. The coke Armco did not buy from Allied was purchased on the open market.

In 1979, Allied decided to withdraw from the coke-producing business, and it began selling its facilities. In 1981, Armco began looking toward the purchase of the Ashland coke plant. Armco apparently considered a number of alternative methods of operating the plant, and it decided that the most efficient way would be to integrate the facility into its Ashland Works. There were two other alternatives: operating it as a self-standing unit, which Armco alleges would have caused redundancy in maintenance personnel and would have continued the need to stockpile coke as a hedge against production interruptions; and purchasing assets only, allowing the company to hire new labor. The latter option was apparently rejected as incompatible with the strong union ethic predominant in Ashland. In addition, it would have been a great burden for Armco to train all new personnel.

In November 1981, Allied and Armco signed a letter of intent concerning the purchase. On November 25, two Allied representatives informed OCAW President Robert Goss of the purchase plan, telling him that Armco would not recognize the OCAW contract. Armco's Corporate Director, James Wallace, informed the Steelworkers District Director Edgar Ball that Armco wished to bring the coke plant workers in under the Steelworkers contract and that the company would not recognize the OCAW. On November 30, Ball called Goss

and related this development. Goss responded that, if satisfactory arrangements could be made with respect to job security, seniority, and pensions, the OCAW would consider releasing the employees.

Numerous conversations between the various parties ensued. The Steelworkers union was concerned that the OCAW might file raiding charges with the AFL-CIO. The OCAW's International Representative, Kenneth McKeand, said he intended to do everything in his power to keep the coke workers OCAW. It soon became clear, however, that the OCAW had little leverage against Armco. An Allied representative stated that, if Armco did not buy the plant, it would be shut down. Thus, despite an overwhelming vote among the coke workers to maintain their OCAW status and avoid accretion into the Steelworkers, the OCAW had no viable alternative because Armco was represented as "the only show in town."

A memorandum of understanding was signed between the Steelworkers and Armco on December 15, 1981, detailing the arrangements governing the purchase of the plant and the hiring of the coke workers. As a result, Armco offered to hire all of the Allied employees, recalling laid-off workers as production increased, with no probationary period required. The Allied workers, though, would all be given a new seniority date of December 31, 1981, and they all would be required to sign Steelworkers dues checkoff and authorization cards as a condition of employment. Although both Goss and McKeand initially objected to this requirement, they eventually told the coke workers to sign the cards rather than risk losing their jobs. At no time, however, did OCAW unconditionally release the employees to the Steelworkers, and at no time did the workers vote to be represented by the Steelworkers.

The sale was final on December 31, 1981, and, as of January 2, 1982, Armco began applying the terms of its bargaining

agreement with the Steelworkers to the coke plant employees. Armco had purchased all of Allied's equipment, material, and supplies, and it operated the plant with the same machinery, equipment, and production methods previously used by Allied.

What then followed were disagreements and struggles within the OCAW itself, apparently caused by dissatisfaction of the Local members. In March 1982, the officers of the Local OCAW sent a letter to the Steelworkers denying that the coke plant was an accretion to the existing Armco unit, and the letter stated that the OCAW had never been notified of negotiations between Armco and the Steelworkers involving the coke plant employees. These negotiations involved the coke workers' terms and conditions of employment and resulted in lost pensions, wages, seniority, vacations, and benefits. The Steelworkers did not respond to the letter.

In his letter of March 18, OCAW President Goss announced a meeting to be held March 28 to determine the position of the members on the issue of whether the OCAW should assert bargaining rights. The letter stated that the OCAW had not previously asserted those rights because its primary concern had been to ensure job opportunities and recall rights. Approximately 300 members attended the meeting, and they voted unanimously to assert the OCAW's bargaining rights at the coke plant.

On April 5, a committee of Local OCAW members sent Armco a letter demanding that it negotiate with the OCAW. The union denied that the coke plant was properly accreted to Armco's Steelworkers bargaining unit, and it asserted that Armco's interest in dealing with a single union was outweighed by the rights of the employees to choose their own bargaining representative. Armco responded by letter on April 12. The company refused to bargain with the OCAW committee on the ground that the coke workers were part of the Steelworkers bargaining unit.

Also on April 5, OCAW President Goss reported to the Local members that he was placing the Local union under the administratorship of an International representative. This change displeased Local members; through attorney Richard Bank, they filed an unfair labor practice charge against the OCAW International. The OCAW International then filed suit in federal court to enjoin the Local committee members from attempting to bargain on behalf of the OCAW. The district judge held a hearing on April 14 at which the various factions of the OCAW reached an agreement. The OCAW International agreed to file an unfair labor practice charge against Armco, and it agreed to attempt to regain bargaining rights. Bank agreed to withdraw the charges brought against the International. The court then entered an order denying the injunction against the Local, but the order did establish a limited administratorship for the purpose of holding an election of officers.

On April 15, the OCAW filed a charge against Armco, and the union made its first formal, authorized demand for recognition as the bargaining representative of the coke workers. The charge against the Steelworkers, which was consolidated with the charge against Armco, was filed by attorney Bank on June 14, 1982.

II. *PROCEEDINGS BELOW*

The administrative law judge upheld the OCAW's complaint against both the Steelworkers and Armco. He ordered that Armco cease granting recognition to the Steelworkers as the bargaining representative of the coke plant employees, cease giving effect to the collective-bargaining agreement between Armco and the Steelworkers for the coke workers, and cease giving effect to any dues checkoff authorizations in favor of the Steelworkers. He also ordered that Armco and the Steelworkers jointly and severally reimburse the coke workers for dues unlawfully withheld since January 1, 1982, with interest. The administrative law judge then recom-

mended that Armco reinstate the terms and conditions of employment for the coke workers that were in effect prior to Armco's unilateral changes. He also recommended that Armco reimburse the employees for any monetary loss suffered as a result. He specifically stated that Armco could not withdraw any benefits which had inured to the coke workers. He then ordered that Armco must bargain upon request with the OCAW as the exclusive representative of the workers in a bargaining unit defined as:

> All production and maintenance, all accounting clerical, office traffic clerical and stores clerical, plant chemist, research technicians, employees of the company at its Ashland, Kentucky [coke] plant, but excluding assistant plant controller, all employee relations department, plant buyer, storekeeper, draftsmen, and technicians of the plant engineering office, professional employees, guards and all supervisors as defined in the Labor-Management Relations Act, 1947.

As for the Steelworkers, the administrative law judge ordered that it cease giving effect to its collective bargaining agreement on behalf of the coke workers, cease accepting or deducting dues from the coke plant employees, and cease restraining or coercing the coke plant employees in the exercise of their rights guaranteed under Section 4 of the Act. He also held the Steelworkers liable for the reimbursement of the coke plant employees, with interest, for any dues deducted since January 1, 1982.

The recommendation and the remedial order were adopted by the National Labor Relations Board. (One of the three members of the panel dissented in part.)

III.

Both the Steelworkers and Armco argue on appeal that the Board abused its discretion in finding that the coke workers

constituted a separate and appropriate bargaining unit and that, therefore, neither party violated the Act by its actions. The Steelworkers union also contends that the charge filed against it was untimely because it was filed beyond the six-month limitations period of section 10(b), 29 U.S.C. § 160(b). As mentioned above, we find that the OCAW's action was timely filed, and we hold that the Board did not abuse its discretion in finding the coke plant employees were a separate and appropriate unit.

A. *The Statute of Limitations*

The Steelworkers union attempts to rely on *United States Postal Service Marina Mail Processing Center*, 271 N.L.R.B. 397 (1984), to show that the OCAW had unequivocal notice of Armco's decision to recognize the Steelworkers as the coke workers' representative earlier than December 15, 1981, the date of the memorandum of understanding. We are not persuaded. While we agree with the Board's statement in that case, that the 10(b) period begins to run at the time an employee receives unequivocal notice of an adverse employment action rather than the time that action becomes effective, 271 N.L.R.B. at 400, we find that such an interpretation does not serve to bar the OCAW's action against the Steelworkers in this case.

Here, the Steelworkers union contends that the statutory period began to run on December 5, 1981, when Armco's manager informed OCAW representatives that Armco would treat the coke workers as an accretion to the Steelworkers unit and recognize the Steelworkers as their bargaining representative. As the Board points out in its brief, there is no evidence that the Steelworkers' representatives present at the December 5 meeting assented to Armco's plan. At a meeting a few days earlier, the Steelworkers had expressed concern over being chareed with violating the no-raiding provisions of the AFL-CIO constitution. The OCAW may reasonably have assumed that the Steelworkers would honor these provi-

sions. Thus, though the announcement at this meeting certainly provided the OCAW with notice of Armco's intent, we cannot construe it to have constituted unequivocal notice of what the Steelworkers planned to do. We find that such unequivocal notice only occurred on December 15, 1981, when the Steelworkers signed the memorandum of understanding with Armco. Thus, the June 14, 1982 charge against the Steelworkers was filed within the six-month time period of section 10(b).

B. *Accretion versus a separate and appropriate unit.*

Both the Steelworkers and Armco contend that the Board improperly determined that the coke plant employees constituted a separate and appropriate bargaining unit and that, therefore, the employees were properly represented by the Steelworkers. We disagree, and we hold that the Board's designation of the coke plant workers as an appropriate unit was correct.

To determine whether two groups of employees should be included in the same bargaining unit, the Board applies a "community of interests" test: the two groups must share a "community of interests sufficient to justify their mutual inclusion in a single bargaining unit." *Pacific Southwest Airlines v. NLRB*, 587 F.2d 1032, 1038 (9th Cir. 1978). This test consists of several factors: (1) similarity in skills, interests, duties, and working conditions; (2) functional integration of the plant, including interchange and contact among the employees; (3) the employer's organizational and supervisory structure; (4) the bargaining history; and, (5) the extent of union organization among the employees. *NLRB v. American Seaway Foods*, 702 F.2d 630, 633 (6th Cir. 1983). "Employee desires," an additional factor frequently included in other circuits, is not a relevant factor in this circuit. *NLRB v. Pinkerton's, Inc.*, 428 F.2d 479, 484 (6th Cir. 1970).

Because of its wide experience, the Board should be given some deference in its selection of an appropriate bargaining

unit through the application of the "community of interests" test. *South Prairie Construction Co. v. Local 627, Operating Engineers*, 425 U.S. 800 (1976). The Board's ultimate determination as to the appropriate unit must be upheld unless it is arbitrary, unreasonable, or an abuse of discretion. *NLRB v. American Seaway Foods, Inc.*, 702 F.2d at 632. But we review the Board' s factual conclusions regarding the individual factors with less deference. The National Labor Relations Act provides the standard of review of such factual determinations: 'The findings of the Board with respect to questions of fact if supported by substantial evidence on the record as a whole shall be conclusive." 29 U.S.C. § 160(a).

We believe the Board's finding that the coke workers constituted a separate, appropriate bargaining unit was not arbitrary, not unreasonable, and not an abuse of its discretion. Further, we believe that the Board's intermediate, factual conclusions, which form the basis for its ultimate determination, are supported by substantial evidence.

The administrative law judge's conclusion that the two employee groups had dissimilar skills, duties, and working conditions is clearly supported by substantial evidence. All parties have acknowledged that the coke workers possess different skills, and that they work in a more hazardous environment than most steelworkers. Moreover, though the coke workers are not necessarily more skilled or better trained, their training is significantly different. This discrepancy surely was one of the reasons Armco chose to hire the Allied employees rather than an entirely new work force. In addition, the carcinogenic conditions existing in the coke plant are a constant hazard to the coke workers, and, therefore, constitute a legitimate ground for separate bargaining.

Armco argues that the second factor, functional integration, was wrongly decided by the administrative law judge to militate against a finding of accretion. Armco emphasizes the continuous nature of the process for coke plant to finished product. We are not persuaded.

Formerly, the coke workers unit was an independent, separate plant with a long bargaining history and a long union relationship. This fact alone suggests the appropriateness of a separate bargaining unit. *Bay Medical Center, Inc. v. NLRB*, 588 F.2d 1174, 1177 (6th Cir. 1978) ("Courts have long recognized that the Board may take bargaining history into account when determining whether a proposed bargaining unit is appropriate."). No machinery has been transferred between the plants, and the coke plant continues to maintain its own telephone exchange, credit union, and time clock. Moreover, the coke workers continue to perform the same work, by the same methods, and using the same machinery as before Armco's purchase. Most employees also have the same supervisors. The only real change has been an increase in production, a change which does not alter the nature of the employing industry.

In addition, the lack of employee interchange between plants militates against a finding of functional integration. *NLRB v. American Seaw--y Foods, Inc.*, 702 F.2d at 635. Out of a workforce of 2700 steelworkers, only 24 maintenance employees have any contact with the coke workers. Such a small, one-way exchange fails to undermine the appropriateness of the coke plant as a separate bargaining unit. *See Victoria Station, Inc. v. NLRB*, 586 F.2d 672, 675 (9th Cir. 1978). Furthermore, the hazardous conditions in the coke plant substantially decrease the possibility that steel plant employees would seek to transfer to coke plant jobs.

This fundamental problem, a lack of employee interchange, is exacerbated by the fact that all of the coke workers have a seniority date of December 31, 1981. In relation to the majority of the steelworkers, the coke workers have no seniority. Therefore, it is unlikely that any of the coke workers will be able to transfer in the near future. Thus, Armco's claim that it has done the coke workers a great favor by giving them the possibility of transferring to a more desirable division is not borne out in reality.

The company also argues that the administrative law judge incorrectly assessed the two union's bargaining histories. Although both the steel and coke industries have a history of independent union organization, Armco emphasizes that, in the steel industry, there are no steel plants in which the coke plant workers are represented by a separate union.

This argument is unavailing. Armco has failed to cite any case in which a previously-independent coke plant has been acquired and the employees accreted to a pre-existing steelworkers bargaining unit. Furthermore, the case upon which it primarily relied, *Granite City Steel Co.*, 137 N.L.R.B. 209 (1962), can be readily distinguished. First, *Granite City* involved only 16 original powerhouse employees in contrast to the 400 employees in this case. Second, the wind and steam produced by the powerhouse workers are not commodities, like coke, which can be purchased in the open market. Moreover, these elements, which are used to operate blast furnaces, are arguably more integral to the steelmaking process. Finally, the powerhouse employees in *Granite City* had previously belonged to a bargaining unit which represented all of the powerhouse employees of the Union Electric Company; they had no history as a separate bargaining unit. These factors made a single bargaining unit appropriate in *Granite City*. Here, however, including the coke workers and the steelworkers in the same bargaining unit would compromise the coke workers' section 7 rights "to self organization . . . [and] to bargain collectively through representatives of their own choosing. . . ." 29 U.S.C. § 157.

Admittedly, the third factor, the employer's organizational structure, may militate in favor of accretion. We concede that Armco exhibited centralized hiring procedures, and it demonstrated that wages, hours, and terms of employment were generally uniform.

But such proof does not undermine the reasonableness of the Board's determinations. As of the date of the hearing,

no new employees had been hired. More importantly, the uniformity in wages, hours, and terms of employment is the result of the disputed conduct: the application of the Steelworkers' contract to the coke plant employees.

In sum, we hold that the Board's finding that the coke workers constituted a separate and appropriate bargaining unit was not arbitrary, not unreasonable, and not an abuse of its discretion. Furthermore, we hold that the factual conclusions which formed the basis of this determination are supported by substantial evidence. Therefore, by treating the employees at the coke plant as an accretion to the steel plant unit, Armco and the Steelworkers violated the Act.

C. *Requiring employees to execute Steelworkers dues checkoff and authorization cards as a condition of employment.*

It is well settled that the dues checkoff provisions are intended to be an area of voluntary choice for the employee. *NLRB v. Atlanta Printing Specialties*, 523 F.2d 783, 787 (5th Cir. 1975). Threats by either a union or an employer that employees will be discharged for failure to sign checkoff authorization cards violates the Act. *Metal Workers' Alliance, Inc.*, 172 N.L.R.B. 815, 817 (1968). Thus, as long as the Board's factual finding that Armco and the Steelworkers compelled the coke plant employees to sign the cards as a condition of employment is supported by substantial evidence on the record as a whole, we must affirm the Board's conclusion of violation. 29 U.S.C. § 160(a).

The evidence demonstrates that the Board's finding is supported by the record as a whole and is entitled to affirmance. Three former Allied employees testified on the record that, during a January 1982 orientation session, they were told that they had to sign checkoff and authorization cards if they wanted to work at Armco. A fourth coke plant employee, recalled from layoff in March 1982, testified that a similar

statement was made in an orientation session following his recall. He specifically testified that he signed the checkoff authorization only because he believed he had to do so to get a job. Armco manager J. Edward Maddox admitted that he had taken the position that coke plant employees had to sign the card to work for Armco. The administrative law judge expressly discredited Armco supervisor Herb Salyer's testimony that he had not made statements which employees specifically remembered him making.

We believe that this testimony constitutes substantial evidence to support the Board's finding that Armco and the Steelworkers compelled the employees to sign the union's dues checkoff and authorization cards as a condition of employment. Thus, we affirm the Board's finding that Armco violated sections 8(a)(1), (2) and (3) of the Act and that the Steelworkers violated sections 8(b)(2) and (b)(1)(A).

D. *Armco's failure to recognize the OCAW*

As we have already stated, we believe the Board correctly concluded that Armco was a successor employer and that the coke plant remained an appropriate unit even after the Armco purchase. Under these circumstances, we have no difficulty in finding that Armco violated sections 8(a)(5) and (1) of the Act by failing to recognize and bargain with the OCAW as the representative of the coke workers before making unilateral changes in their working conditions.

The facts fail to support Armco's contention that the OCAW waived its bargaining rights. In any case, such a waiver of a statutory right must be in "clear and unmistakable language." *Timken Roller Bearing Co. v. NLRB,* 325 F.2d 746, 751 (6th Cir. 1963). An unambiguous waiver was not evident in this case.

Therefore, as was the case in *NLRB v. Burns Security Services,* 406 U.S. 272, 279-80 (1972), the bargaining unit

remained unchanged, and Armco was not entitled to upset the union majority by recognizing another union.

We believe there was substantial evidence to support the Board's conclusion that Armco violated sections 8(a)(5) and (1).

IV. *Conclusion*

In essence, Armco and the Steelworkers have asked for leniency based on the current adverse economic climate of the steel industry. Their plea also emphasizes the charitable nature of Armco's act of buying a suffering plant and hiring its entire workforce. We have no doubt that Armco stepped in at a crucial moment in the lives of the coke workers and Allied, and we sympathize with the plight of those in the steel industry. We also recognize that the relatively small size of the coke workers bargaining unit creates a possibility of unfair leverage. None of these factors, however, justifies the flagrant refusal of Armco and the Steelworkers to recognize and bargain collectively with the OCAW.

It has come to our attention that the remedy ordered against Armco may be too harsh, for it would require the company to pay wages perhaps as much as three dollars per hour more than the coke workers have been receiving since the time of the plant's purchase. In *Kallmann v. NLRB*, 640 F.2d 1094 (9th Cir. 1981), the court set aside part of a similar remedial order and remanded the matter to the Board. The court there found that "[t]he function of the remedy . . . is to restore the situation, as nearly as possible, to that which would have occurred but for the violation." *Id.* at 1103, *citing Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). In *Kallman*, the facts indicated that the employer would not have agreed to union demands to pay the higher rate.

We believe that the same may be true in this case. Thus, we hold that the employer is responsible for the pay difference for the time which would have been required for bar-

gaining. We will remand this matter to the National Labor Relations Board, however, for the factual determination required to decide the extent of backpay. As the court did in *Kallman*, we will leave it to the Board's discretion whether the resolution of these issues should be left to bargaining between the parties.

Therefore, with the exception of the backpay award, we affirm the findings of the National Labor Relations Board, and we grant enforcement of its order.

NATIONAL LABOR RELATIONS ACT

Sections 8 and 9 of the National Labor Relations Act, as amended, 29 U.S.C. §§ 158, 159, provide in pertinent part:

§ 8 Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, . . .

§ 9 Representatives and elections—Exclusive representatives; employees' adjustment of grievances directly with employer

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, . . .

(c) (5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

No. 87-1514
No. ________

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARMCO INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

UNITED STEELWORKERS OF AMERICA, AFL-CIO, and its Local 1865,
Petitioners,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petitions for Writ of Certiorari to The United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL APPENDIX

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NOTE

The opinions of the National Labor Relations Board and the Administrative Law Judge in this supplemental appendix contain the page numbers of the original texts. These are inserted in the texts in brackets and appear respectively as [NLRB ___] and [ALJ ___].

DDeB
279 NLRB No. 143 D-3469
Ashland, KY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ARMCO, INC., EASTERN STEEL DIVISION,
ASHLAND WORKS

and Case 9-CB-18227

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION, AFL-CIO

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
AND ITS LOCAL UNION 1865

and Case 9-CA-5285

RICHARD M. BANK, an Individual

DECISION AND ORDER

On 18 July 1984 Administrative Law Judge John H. West issued the attached decision. The Respondents filed exceptions and supporting briefs. The Charging Parties and the General Counsel filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decisions and the record in light of the exceptions and briefs and has decided to affirm the Judge's rulings,[1]

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[1] The Respondents excepted to certain of the judge's rulings on admissibility of evidence. We find no prejudicial error.

Charging Party Bank has requested oral argument. This request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[NLRB 2]

findings,[2] and conclusions and to adopt the recommended Order.

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[2] In adopting the judge's findings, we find it unnecessary to rely on G. C. Exh. 8 and C. P. Bank's Exhs. 11-18 which are the minutes of the 2, 7, 8, 10, 15, 28, and 29 December 1981 meetings between Armco and the Steelworkers Union or the judge's discussions of such minutes.

In adopting the judge's findings, we do not pass on the judge's discussion at fn. 32 of his decision relating to the "bug-pond" incident.

The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We find no merit to Respondent Steelworkers' contention that the underlying unfair labor practices alleged in the 14 June 1982 charge against USWA occurred beyond the 6-month period specified in Sec. 10(b) of the Act. Relying on the Board's decision in *Postal Service Marina Center*, 271 NLRB 397 (1984), the Respondent argues that the 10(b) period began running 5 December 1981 when it asserts OCAW had unequivocal notice that Armco had decided to accrete the coke plant to the Steelworkers unit, and thus the 10(b) period expired before the filing of the charge on 14 June 1982. In *Postal Service Marina Center* the Board held that the 10(b) limitations period commences when an employee is notified that he will be terminated and not on the date the employee is actually terminated. *Postal Service Marina Center* involved a final adverse employment decision and is factually distinguishable. Assuming arguendo, however, that the *Postal Service Marina Center* analysis is applicable to the subject case, we conclude that the "adverse employment decision" occurred at the earliest on 15 December 1981 when the Respondents signed the memorandum of understanding which subsequently became effective only upon the actual purchase of the coke plant on 31 December 1981. Thus, we agree with the judge's finding that the 14 June 1981 charge against the Steelworkers was timely filed. Member Babson finds it 279 NLRB No. 143 D-3469 necessary to rely only on the latter ground in finding *Postal Marina Center* distinguishable.

The judge found, inter alia, that following the purchase of certain assets of Allied Chemical Corporation, Semet-Solvay Division (Allied), including its coke plant facility, equipment, 279 NLRB No. 143 D—3469 supplies, and materials at Ashland, Kentucky, Respondent Armco became a successor employer of Allied. The judge further found that the coke facility employees whom Allied formerly employed constituted an appropriate unit. The judge concluded that Respondent Armco violated Section 8(a)(5) of the Act by refusing to recognize and bargain

[NLRB 3]

with Oil, Chemical and Atomic Workers International Union, AFL-CIO (OCAW), which had represented the coke facility employees when Allied owned the plant.

We fully agree with the judge's reasoning and conclusion. Specifically, we adopt the judge's findings that Armco is a successor employer, the coke facility employees constitute an appropriate unit, and OCAW did not waive its claim to represent the employees or disclaim interest in the unit. In light of these findings, we conclude that Armco was legally bound to recognize and bargain with the incumbent Union, OCAW. *NLRB v. Burns Security Service*, 406 U.S. 272 (1972). Contrary to our dissenting colleague, we conclude that even if Armco had been faced with competing claims for recognition, under any view of Board law a recognition demand made by an outside union representing another unit, unsupported by even the filing of a representation petition, would not alter Armco's obligation to recognize and bargain with OCAW.[3] The dissent fails to cite any authority in support of its novel proposition that a successor employer "must not recognize and bargain" with an incumbent union based merely on the

[3] Compare the majority and dissenting opinions in *RCA Del Carribe*, 262 NLRB 963 (1982).

demand of another union without even a representation petition having been filed.[4]

Furthermore, our dissenting colleague overlooks several facts which refute his argument that OCAW and the Steelworkers made competing claims for

[NLRB 4]

representation of the coke facility employees. There is no doubt in the record concerning the identity of the labor organization Armco intended to bargain with. Armco unilaterally announced that it would recognize OCAW as the bargaining representative of the coke facility employees whom OCAW had represented under Allied ownership and that Armco would treat those employees as an accretion to the Steelworkers-represented unit at Ashland Works. The Steelworkers did not demand recognition but rather Armco contacted the Steelworkers about representing the coke plant employees. Once contacted the Steelworkers expressed concern over OCAW filing raiding charges and attempted to ascertain whether OCAW would release its membership. The facts belie a characterization that Armco was faced with bona fide competing claims for representation. Accordingly, we conclude that Armco's conduct in refusing to recognize OCAW as the exclusive representative of the coke plant employees and unilaterally changing

[4] The sole case the dissent cites, *Acme Steel Co.*, 110 NLRB 913 (1954), is a representation case, not an unfair labor practice case, and therefore does not address the question presented here. In *Acme Steel*, an incumbent union sought recertification through the Board's election procedures, rather than filing refusal-to-bargain charges, following a relocation of the employer's operations. The Board directed an election to permit the employees to decide whether they wished to continue to be separately represented by the previously certified union or whether they wished to be a part of the existing unit at the new location and represented by the intervening labor organization. By contrast, in the instant case, no petition has been filed by any party, but our dissenting colleague would nevertheless require resolution of the matter through a Board election.

the terms and conditions of unit employees without notice to or bargaining with OCAW violated Section 8(a)(5) and (1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Armco, Inc., Eastern Steel Division, Ashland Works, Ashland, Kentucky, its officers, agents,

[NLRB 5]

successors, and assigns, and United Steelworkers of America, AFL-CIO, and its Local Union 1865, Ashland, Kentucky, its officers, agents, representatives, shall take the action set forth in the Order.

Dated, Washington, 30 May, 1986
D.C.

PATRICIA DIAZ DENNIS, Member

MARSHALL B. BABSON, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[NLRB 6]

CHAIRMAN DOTSON, dissenting in part.

I agree with my colleagues insofar as they find that Respondent Armco violated Section 8(a)(1), (2), and (3) by recognizing Respondent Steelworkers and by applying a collective-bargaining agreement containing a union-security provision. I also agree that Respondent Steelworkers violated Section 8(b)(1)(A) and (2) by accepting such recognition and entering into this contractual relationship. For the following reasons however I would dismiss the 8(a)(5) allegations against Respondent Armco.

Briefly, the evidence establishes that on 31 December 1981 Respondent Armco purchased a coke plant facility

from Allied Chemical Corporation (Allied). For approximately 30 years Charging Party OCAW had represented employees at the Allied coke plant. For approximately 40 years Respondent Steelworkers had represented employees at a nearby steel works production facility operated by Respondent Armco. Following the acquisition of the coke plant Respondent Armco granted recognition to the Steelworkers as bargaining representatives of the coke plant employees.[5] No attempt was made to determine the desire of these employees for representation. Instead under the guise of "accretion" Respondent Armco and Respondent Steelworkers merged the coke plant employees into one overall bargaining unit of steel works and coke plant employees and applied the existing Steelworkers bargaining agree- ment, with modifications, to the coke plant employees formerly represented by OCAW.[6]

I agree with the majority that to accrete the historically separate unit of coke plant employees represented by OCAW into an overall steel-producing

[NLRB 7]

unit represented by Steelworkers in these circumstances is improper.[7] This is particularly true because of the con-

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[5] The parties stipulated that all of the hourly rated employees hired by Respondent Armco at the coke facility formerly were members of the OCAW bargaining unit.

[6] The steel works facility consists of approximately 3700 employees. The coke plant consists of approximately 350-400 employees.

[7] Although accretion of the coke plant employees into a single unit is improper, it does not necessarily follow that such a unit is inappropriate. Indeed it appears that either a single unit or a separate unit of coke plant employees may be an appropriate bargaining unit under the circumstances of this case. Thus the coke plant operation has been functionally integrated into the steel production operation and there is a centralization of hiring, and a common labor policy at the coke and steel facilities. Further, as found by the judge, it appears that operations in the steel industry tend to be highly integrated and bargaining

current competing claims for representation of the coke plant employees by Steelworkers and Charging Party OCAW following the purchase of the coke facility by Respondent Armco. Indeed in my view these competing claims for representation raise a question concerning representation regarding the coke plant employees. In this posture the appropriate mechanism to resolve the question concerning representation is through a self-determination election among the affected coke plant employees. See, e.g., *Acme Steel Co.*, 110 NLRB 913 (1954). Ordering Respondent Armco to bargain with OCAW, as do my colleagues, notwithstanding the competing claim for representation by the Steelworkers, shares the identical infirmity as the "accretion" imposed unilaterally by Respondent Armco: resolution by an outside party of the question concerning representation without affording the affected coke plant employees an opportunity to resolve the question for themselves through an expression of majority will.

The majority exalts form over substance by its reliance on the Steelworkers' failure initially to contact Respondent Armco prior to its eventual acceptance of recognition over the coke plant employees. Contrary to

[NLRB 8]

my colleagues, I cannot accept the notion that Respondent Armco "unilaterally" conferred recognition on the Steelworkers or that the Steelworkers' desire and intention to gain recognition on behalf of these employees was not "bona fide." In point of fact, the record reveals that Armco and the Steelworkers conferred in November and December 1981 to discuss representation of the coke plant employees and that, as a result of these meetings, Armco

generally proceeds on a systemwide basis. On the other hand the separate historical identity of the coke plant facility has not been obliterated by the acquisition and, as found by the majority, numerous factors exist to support a finding that a separate coke plant unit is also an appropriate bargaining unit.

and Steelworkers *mutually* agreed on 15 December 1981 in a memorandum of understanding to merge the coke plant employees into the existing steel works bargaining unit. If the Steelworkers did not seek or desire to represent these employees, it could have withdrawn from negotiations and disclaimed interest. It did not. Instead, it accepted recognition.[8] It is, of course, undisputed that OCAW *also* desired to represent the coke plant employees. In these circumstances, I am puzzled at my colleagues' reluctance to recognize the reality of this situation: two labor organizations expressly desired to represent the coke plant employees; both labor organizations possessed a reasonably based claim for representation, supra, footnote 3; and the Board's conferral of recognition on behalf of OCAW through an 8(a)(5) proceeding no more ensures the coke plant employees' right of self-determination than does Respondent Armco's recognition of the Steelworkers.

Further, in support of its finding that Armco violated Section 8(a)(5) and (1) by failing to recognize OCAW, the majority argues that Armco was

[NLRB 9]

obligated to bargain with OCAW, in part, because the Steelworkers failed to file a representation petition. Again, my colleagues exalt form over substance. On the one hand, they contend that Armco "unilaterally" conferred recognition on the Steelworkers. At the same time, they contend that notwithstanding this grant of recognition, Steelwork-

[8] At fn. 2 of their opinion, my colleagues concede that the unlawful grant and acceptance of recognition "occurred at the earliest on 15 December 1981 when Respondent signed the Memorandum of Understanding" which subsequently became effective on 31 December 1981. Obviously, irrespective of what they may assert later in their opinion, my colleagues recognized, at least implicitly, that Armco did not "unilaterally" confer recognition on the Steelworkers and that recognition was achieved when Steelworkers affirmatively and voluntarily signed the memorandum of understanding following negotiations.

ers should have filed a petition to secure a status that it could achieve privately by signing the memorandum of understanding. My colleagues ignore the practical reality that, in these circumstances, Steelworkers simply had no incentive to file a petition. Had Armco remained *neutral* in the face of the desire of two labor organizations to represent its coke plant employees, as it was required to do, appropriate resolution of representation claims would have been feasible.

Finally, the majority does not take issue with the fact that either a separate unit of coke plant employees or a single combined unit of coke plant and steel works production employees may be an appropriate unit, supra footnote 3. Armco previously has had no bargaining relationship with OCAW regarding the coke plant unit. It has, however, had a long bargaining relationship with Steelworkers regarding the steel works unit. In these circumstances, the majority's characterization of OCAW as the "incumbent" union and Steelworkers as the "outside" union within the meaning of *RCA Del Caribe*, 262 NLRB 963 (1980), is misplaced. *Acme Steel Co.*, supra, teaches that election procedures are available to resolve representation issues in such circumstances. In my view, it is not helpful to resolve critical self-determination issues in cases of this kind simply by a mechanical resort to conclusionary terms like "incumbent" union and "outside" union. The practical realities revealed by the record render it unclear as to which Union has the "greater" claim and which bargaining unit should encompass the coke

[NLRB 10]

plant employees. I believe that the employees should be the ones who decide these questions.

Accordingly I would find that Respondent Armco was required to refrain both from recognizing Respondent Steelworkers *and* from recognizing Charging Party OCAW following the acquisition. Representation of the coke plant

employees and the scope of any appropriate unit to be represented should be decided by a self-determination election among the affected employees and not by the Employer or this Board. *Acme Steel Co.*, supra. Because Respondent Armco need not and indeed must not recognize and bargain with either Union until the question concerning representation is resolved it follows that Respondent Armco did not violate Section 8(a)(5) and (1) when it refused to bargain with OCAW. I would therefore dismiss that portion of the complaint.

Dated, Washington, D.C. 30 May 1986

DONALD L. DOTSON, Chairman
NATIONAL LABOR RELATIONS BOARD

JD-244-84
Ashland, KY.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ARMCO, INC.[1] EASTERN STEEL DIVISION,
ASHLAND WORKS

and Case 9—CA—18227

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION, AFL-CIO

and

UNITED STEELWORKERS OF AMERICA,
AFL-CIO, AND ITS LOCAL UNION 1865

and Case 9—CB—5285

RICHARD M. BANK, An Individual

JAMES E. HORNER, ESQ., of Cincinnati, OH, for the General Counsel.
PAUL L. LANDRY, ESQ., and JEROME POWELL, ESQ. (REED, SMITH, SHAW & MCCLAY), of Washington, D.C., for the Respondent Company.
CARL B. FRANKEL, ESQ., of Pittsburgh, PA, for the Respondent Unionn.
HELEN DE HAVEN, ESQ., of Knoxville, TN, and JOHN R. TADLOCK, ESQ., of Lakewood, CO,

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[1] At the outset of the hearing a motion was made to amend the corporate name.

for the Charging Party Union.
RICHARD M. BANK, ESQ., of
Washington, D.C. *Pro Se.*

DECISION

Statement of the Case

JOHN J. WEST, Administrative Law Judge: The charge of Oil, Chemical and Atomic Workers International Union, AFL-CIO (OCAW) against Armco Inc., Eastern Steel Division, Ashland Works (Armco) in Case 9—CA—18227 was filed April 20,

[ALJ 2]

1982. And the charge by Richard M. Bank in 9—CB—5285 against United Steelworkers of America, AFL-CIO, and its Local union 1865 (Steelworkers) was filed June 14, 1982. Subsequently, May 11, 1983, a consolidated complaint was issued alleging (a) that on December 31, 1981 Armco purchased certain assets of Allied Chemical Corporation, Semet-Solvay Division (Allied) including its coke plant facility, equipment, supplies and materials at Ashland, Kentucky; that Armco is a successor of Allied; and that specified coke facility employees of Armco who were formerly employed by Allied constitute an appropriate unit; (b) that Armco violated Sections 8(a)(1), (2), (3), (5) and 8(d) of the National Labor Relations Act, as amended (Act), collectively, by granting recognition to the Steelworkers on or about December 15, 1981 as the exclusive bargaining representative of the involved unit and applying the existing (as supplemented by the parties) agreement between Armco and the Steelworkers to the unit, notwithstanding the fact that at the time the Steelworkers did not represent an uncoerced majority of the employees in the unit; by requiring, since on or about December 31, 1981, employees in the unit to execute dues checkoff and authorization cards for the Steelworkers as a condition of employment and rendering aid, assistance and support to

the Steelworkers; and by refusing since on or about April 12, 1982, to recognize and bargain with OCAW as the exclusive collective-bargaining representative of the employees in the unit, and (c) that the Steelworkers violated Sections 8(b)(1)(A) and (2) of the Act, collectively, with respect to the above-described acts which occurred on or about December 15 and 31, 1981. Respondents deny violating the Act.[2]

A hearing was held on August 9-12 and 16 and 17, 1983, in Ashland. Briefs were filed in December 1983 by each of the parties. In January 1984 Bank filed a Motion to strike portions of Armco's brief and Armco replied. That matter will be handled *infra*, along with the Motion of Armco to supplement the record and the replies thereto.

Upon the entire record[3] in this proceeding, including my observation of the witnesses and their demeanor, and after considering the aforementioned briefs, I make the following:

[ALJ 3]

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[2] In its Answer, Armco also asserts that OCAW waived any claim which it might have to represent the involved employees; that OCAW is estopped to assert such a claim; that the involved employees were properly accreted into the Steelworkers; that the OCAW failed to make a timely demand for recognition; and that the events giving rise to the Complaint occurred more than 6 months prior to the filing of the charge by OCAW. The Steelworkers, in its Answer, also alleges that OCAW expressly relinquished and disclaimed any further interest in representing the involved employees; that the involved employees were lawfully accreted; that the Steelworkers relied on OCAW's disclaimers; and that OCAW, having made no recognition demand until nearly 5 months after the transition in representative status, waived its right to represent the involved employees and is estopped from challenging the Steelworkers status as bargain representative of these employees.

[3] The unopposed motion of the Steelworkers to correct the transcript is hereby granted, as set forth in Appendix C.

Findings of Fact

I. Jurisdiction

Armco, an Ohio corporation, maintains facilities in Ashland, where it is engaged in the manufacture of coke and the manufacture and sale of steel and steel products. The complaint alleges, Armco admits, and I find that at all times material herein, it has been engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act. It is alleged, admitted, and I find that OCAW and the Steelworkers are labor organizations within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. The Facts

For about 35 years Allied engaged in the production of coke and associated byproducts at the involved coke plant in Ashland. OCAW and its predecessor (OCAW merged with the predecessor in 1955) represented employees at the plant since 1952. (The Board certified representation of production and maintenance workers that year. In 1966 office, accounting, clerical, office traffic clerical, and store clerical employees were added. And in 1968 research aides were added.) Such recognition was embodied in successive collective-bargaining agreements, the most recent of which became effective August 5, 1979 and had a termination date of May 14, 1982.[4] The parties stipulated that Allied

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[4] General Counsel's Exhibit 2. The agreement contains the following "successors" clause:

> Section 22. This Agreement shall be binding upon all the parties hereto, their successors, administrators, executors and assigns. In the event an entire operation or any part thereof is sold or leased or taken over by sale or lease, assignment, receivership or bankruptcy proceedings, such operation shall continue to be subject to the terms and conditions of this Agreement for the life thereof.
>
> The Employer shall give notice, with a copy to the Union, of the existence of this Agreement to any purchaser, lessee or assignee of the operation covered by this Agreement or any part thereof.

sold coke and by-products on the open market to various customers, including Armco; and that the coke plant was not attached to or associated with any other facility. Also, the parties stipulated that during the calendar year 1981 the coke facility sold and shipped nearly all of its coke production, which amounted to 500 tons per day, (its daily production capacity was approximately 2,800 tons a day) to Armco; and that during the same period, Armco's coke needs at the Ashland Works were approximately 2,800 tons per day.[5]

[ALJ 4]

For many years, Armco engaged in the manufacture of steel and steel products at its Ashland Works. And since 1942 the Steelworkers has been the certified and recognized representative of a unit of hourly rated production and maintenance employees at the Ashland Works. Such recognition has been embodied in a series of collective-bargaining agreements the latest of which became effective March 1, 1983 and by its terms will expire on July 31, 1986. General Counsel's Exhibit 3.

On November 20, 1981, Allied forwarded a five-page letter, Charging Party Bank's Exhibit 19, to Armco, Inc. in Middletown, Ohio, the first paragraph of which reads as follows:

> This letter sets forth the basis of our present mutual understanding under which Armco . . . proposes to acquire the coke plant of Allied . . . located at Ashland. . . .

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[5] Charging Party Bank's Exhibit 9 shows that in 1971 Allied's Ashland and Ironton, Ohio coke plants, as here pertinent, supplied much of the coke Armco needed at its Ashland Works but the amount Allied supplied, as indicated above, declined greatly by 1981. Allied's Ironton coke plant was sold in late 1976 or 1977 to a company identified as McCloud and it subsequently shut down. In 1979 Allied announced that it was getting out of the coke business.

At page 2 of the letter the following appears:

> 3. Representatives of Allied and Armco shall negotiate with respect
>
> (a) to the continued employment in their current positions and wages of all present Coke Plant employees, both hourly and salaried; and
>
> (b) to providing such employees with pension benefits which are equivalent to those benefits now in effect, crediting such employees for length of service at Allied for purpose of eligibility, vesting and accrual of benefits.
>
> It is recognized in connection with the foregoing, that various arrangements need to be negotiated with the *unions* involved. [Emphasis added.]

The letter ends with: "[T]his letter is a statement of present intent only and no legal obligations are created hereby," and [a]greed to this 23rd day of November 1981. ARMCO, INC. By . . . ."[6]

The President of OCAW, Robert Goss, testified that he first learned of the possible purchase on November 25, 1981 when two representatives of Allied, Robert Geiger and Jack Kemp, flew to Denver, Colorado, OCAW's headquarters, to meet with Goss and inform him that Allied had signed a letter of intent to sell the involved plant.[7] They advised goss that during negotiations it

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[6] The letter is signed by representatives of Allied and Armco.

[7] The meeting took place at the airport Sheraton Hotel on Thanksgiving Eve. See the place at the airport Sheraton Hotel on Thanksgiving Eve. See the entry for November 25, 1981 in General Counsel's Exhibit 6, which is the report of Goss to the International Executive Board dated February 8, 1982. Goss testified at least three times that this was the first he heard of the possible purchase by Armco of the involved coke plant. At one point goss testified that he mentioned the sale to Lloyd McBride, the president of the Steelworkers, at an Executive Council Meeting of the AFL-CIO which might have been held in No-

[ALJ 5]

became apparent that Armco was not going to recognize OCAW's labor agreement; that depending on what rights were exercised by OCAW they might just have to close the plant and Armco could reopen it and employ whoever they wanted; and that this was the best deal in town for their employees and it looked like the only ballgame for Goss at that point was to face the situation.

Armco's Corporate Director of Industrial Relations, James Wallace, testified that after the letter of intent was signed, he telephoned Edgar Ball, Director of District 37 of the Steelworkers.[8] Wallace informed Ball that Armco would not recognize OCAW as the bargaining agent of the employees at the coke plant nor would Armco be a successor but rather the coke plant would be operated as

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vember 1981 (or February 1982). General Counsel's Exhibit 6 shows that goss attended such a meeting in New York, New York on November 14, 1981. In view of Goss' testimony about when he first learned of the sale, it would appear that he was mistaken about mentioning the sale to McBride at the above-described November 14 meeting. McBride testified that he and Goss had discussed the same at an Executive Council meeting but he did not testify regarding the date of the meeting. This matter will be dealt with more fully *infra*.

[8] On direct-examination Wallace testified that this call occurred in early November 1981. On cross-examination he testified that the phone call to Ball would have been after the signing of the letter of intent. Ball initially testified that Wallace placed this call in the beginning of or mid-November 1981 and that he, Ball, then called Goss within a few days. Subsequently, Ball testified that he could not be sure whether he called Goss before or after Thanksgiving and he had no written notation or internal inter-office memorandum about the conversation. As noted *infra*, Goss testified and documentary evidence was received showing, that Ball called Goss on November 30, 1981. Paul Rusen, Director of District 23 of the Steelworkers, testified that after Ball told him, he, Rusen, called Wallace, about November 12, 1981 and Wallace told Rusen that Armco was close to signing an agreement of intent. Wallace did not corroborate this. Rather, Wallace testified that the first Steelworkers representative he spoke to was Ball and this was after the letter of intent was signed. Rusen's testimony is not credited.

a department of Armco and its employees would be represented by the Steelworkers. Wallace testified that Armco's decision to have the coke plant come under the Steelworkers contract was irrevocable since Armco did not believe that the operation would be viable if there were two bargaining units. Ball told Wallace he, Ball, would inform Steelworkers International Headquarters and Rusen since it was his district, and both would contract OCAW regarding Armco's position.

On November 30, 1981 Ball called Goss. The following is Goss' intra organization communication to International Officers (General Counsel's Exhibit 5):

> SUBJECT: SEMET-SOLVAY UNIT Date December 2, 1981
>
> ASHLAND, KENTUCKY
>
> On November 30th, 1981, Ed Ball, District Director for the United Steel Workers of America, in Houston, Texas, tried to reach me by long distance telephone and in failing to do so, spoke with my assistant, Harry Burk.
>
> The nature of Brother Ball's call concerned the matter of ARMCO Steel purchasing the plant of Semet-Solvay, which is a subsidiary of
>
> [ALJ 6]
>
> Allied Chemical Company in Ashland, Kentucky, this plant is contiguous with ARMCO Steel property at this location.
>
> Brother Ball had been advised by ARMCO Steel that upon completion of their take over of Semet-Solvay, they would not agree to recognize our contract covering the employees of Semet-Solvay, but on the other hand would incorporate such employees under the Steel Workers Contract.

> Ed Ball's call to the international Headquarters was to ascertain what the OCAW's position would be in this matter, he advised my assistant, Harry Burk, that ARMCO Steel had requested a meeting with him to discuss this transition, and he did not intend to proceed with the meeting until he had some understanding of the positions with the Steel Workers and OCAW.
>
> In the afternoon of November 30th, 1981, I contacted Ed Ball at his Houston office and advised him that it was my position, that he should proceed to meet with ARMCO Steel, regarding a take over of this plant, and to secure a complete understanding under what conditions the employees of Semet-Solvay would be offered employment with ARMCO Steel in all matters pertaining to their seniority, lay off procedures, call back procedures for employees now laid off, fringe benefits, and wages, after this matter is discussed and clarification is reached with ARMCO Steel, Brother Ball is to contact me back, and at that time the OCAW will make some decision as to whether we release our members to the Steel Workers or stand on our legal rights, that we are their collective bargaining representative, regardless of who purchases the plant and weigh the consequences of such action.
>
> Ed Ball's attitude on this matter was that the Steel Workers only wanted to do what could be harmoniously worked out with the OCAW

Goss testified that he told Ball that "once everything was revolved satisfactorily to our people, I would consider releasing that membership within our own structure."[9]

[9] It is noted that Goss signed the intra-organization communication. It is also noted that according to General Counsel's Exhibit 6, Goss left Denver for Washington, D.C. on December 1, 1981 and returned to Denver December 3, 1981. The signature itself is not dated. It is concluded that the memorandum was typed December 2, 1981 and Goss

[ALJ 7]

Wallace testified that he met with Ball, Rusen and a Steelworkers' staff attorney at the Steelworkers headquarters in Pittsburgh, Pennsylvania; and that at the meeting the following was reviewed: (a) Armco was actively trying to purchase the coke plant; (b) Armco would not be a successor employer and would not recognize OCAW but rather would operate the coke plant as a department of the Ashland Works; and (c) the employees at the coke plant would come under the contract Armco had with the Steelworkers. Wallace testified that he did not recall whether he became aware at that meeting that Steelworkers representatives were discussing the matter with OCAW. Ball testified that the meeting was held toward the end of November 1981, and that it was basically agreed to bring Allied employees under the Master Agreement

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signed it before it was distributed upon his return to Denver. As indicated in note 8, *supra*, Ball was not sure whether he called Goss before or after Thanksgiving. Ball testified that when he first spoke with Goss he did not know very much about the matter but 2 weeks later Goss called Ball and said that he, Goss, had made a decision "that the best interests of the people probably would be served by them becoming part of the Ashland Works and coming under the Steelworkers contract, and that we should proceed to arrange that." According to Ball's testimony, Goss did not attach any condition to what he told Ball, and Goss had no questions about Ball's understanding with Armco about seniority provisions, layoff provisions, and call-back procedures. Ball conceded that before releasing a Steelworker local he would find out whether the members wanted to be released and whether their jobs and benefits were protected. Goss impressed me as being a credible witness. He supplied detailed testimony and documentary evidence to support it. Admittedly he did make some mistakes about dates (i.e. the date on which he had a discussion with McBride at an Executive Committee meeting of the AFL-CIO) but even then he indicated that he was not sure and either he went on to supply sufficient details whereby the correct date could be ascertained, as indicated *infra*, or other corroborating witnesses testified supplying the specifics. Ball, on the other hand, could not give the specific date of the conversations, provided no documentary support, and his testimony does not square with common sense. Ball is not credited.

applicable to the Ashland Works. Rusen testified that the meeting occurred late in November 1981; that Jerry Powell also attended (corroborated by Charging Party Bank's Exhibit 14, page 1.); that the Steelworkers advised Armco that the Steelworkers did not want to be formally charged by OCAW under the AFL-CIO Internal Disputes Plan, with raiding OCAW's members (described as an Article XX charge); and that Ball advised Rusen that he had already spoken with Goss who was "going to release the employees of OCAW." Ball's alleged statement to Rusen was offered only as a statement made and not for the truth of the matter asserted. If Goss had unconditionally released the involved Allied employees, the Steelworkers would not have had to be concerned with an Article XX change. But Goss had not unconditionally released the involved employees. If, as noted above, Ball was discussing his meeting during his conversation with Goss on November 30, 1981, and if Ball was being truthful, then the meeting had not been held as of the afternoon of November 30, 1981. Rusen did not testify that Ball announced the release to Wallace, and Wallace's testimony regarding this meeting does not demonstrate that he was put on notice at that time that the involved employees were unconditionally released by Goss. Even Ball does not corroborate Rusen regarding what Ball allegedly said to Rusen at the Pittsburgh meeting.

On December 1, 1981, Kenneth McKeand, an International Representative of OCAW, met with James Kemp and Robert Alexander of Allied in Huntington, West Virginia. Kemp informed McKeand that a letter of intent had been signed with respect to the sale of the coke plant and that Armco did not intend to recognize OCAW as a bargaining agent. McKeand told Kemp that the unit was OCAW and he would do anything in his power to see that it remained that way. McKeand also testified that either at this meeting or at a meeting held the

[ALJ 8]

next day, Kemp told him that Goss had not agreed to release the involved employees.

The Executive Council of the AFL-CIO met in Washington, D.C. on December 2, 1981. General Counsel's Exhibit 6. McBride and Goss were present. Goss was not sure of the date of the meeting but he testified that he recalled that United States Steel had announced they were buying marathon Oil and McBride joked with Goss about the two unions merging;[10] that following this exchange he said to McBride we have another situation I think we ought to try to work together; and that he thought he

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[10] McKeand testified that on December 5, 1981 he spoke with Goss who during the conversation indicated that there had been an AFL-CIO meeting in Washington and that he, Goss, and McBride "either he had casually mentioned this [the involved purchase] to President McBride or vice versa, that there was no discussion on it." Goss' testimony regarding this meeting was:

> Well, we sit in this meeting together. That particular day, U.S. Steel had announced they were buying Marathon Oil. And Mac [McBride] said to me, Mr. McBride, 'well, I guess we ought to merge, U.S. Steel just bought Marathon.'

Respondent Steelworkers points out on brief, page 96, footnote 88, that the announcement was made on November 19, 1981 and covered in the press the following day. Since the exhibit Respondent Steelworkers cites, General Counsel 6, shows that the November 1981 meeting of the Executive Council of the AFL-CIO was held on November 14-18, 1981 and Goss was en route to Philadelphia on November 19, it appears that the above-described proposal was not publicly announced before Goss left New York and, according to Respondent Steelworkers' own assertion, was not covered in the press until the day after Goss left New York. In the above-described testimony, Goss, in my opinion, was not testifying that the announcement was made on that particular day. Rather, Goss was testifying as to what McBride said on that particular day and the insertion about the announcement of the purchase was made to explain why McBride made his statement. The first Executive Council meeting that Goss attended after the announcement was held on December 2, 1981.

mentioned the town of Ashland but it was apparent to Goss that McBride was not aware of that development and the topic was dropped.

On December 2, 1981 McKeand met with kemp and other specified representatives of Allied, namely Alexander, Richard Washburn, Paul Harvey and Gene Moore, along with specified representatives of the involved OCAW local, Local 3-523, James McKnight (the Local's President), Ted Cordle, Charles McGraw, and Darrel Clay (the Local's recording secretary). During the meeting Kemp stated that a letter of intent tentatively to sell the coke plant had been signed with Armco and it did not intend to recognize the OCAW, and that the people would be placed into the Steelworkers Local 1865 under the accretion doctrine. McKeand advised Kemp that the people in the unit did not agree to go to the Steelworkers; and that there was a successor clause in the contract between allied and OCAW Local 3-523. McKeand believed that it was in this meeting that he stated to Kemp that Allied should have made the successorship clause a condition of sale to which either Kemp or Alexander replied to the effect that this was the only show in town and they would like for the people to cooperate and go along with it. McKeand also believed that Kemp compared the two contracts with him on this date. Clay gave testimony

[ALJ 9]

which corroborated McKeand's. Clay also added that Kemp advised them that the involved employees would be required to have a 520-hour probationary period with Armco. The union committee then caucused and called OCAW International Representative John Williams and informed him of what they had been told and expressed their displeasure with it. Assertedly Williams said that whatever the Local decided, the International would support. Clay testified that when McKeand told Allied representatives that the employees did not intend to accept the terms,

Kemp replied that Allied wanted to get out of the coke business "and . . . it looked like this was the only show in town and . . . he indicated that possibly . . . the plant could be shut down." Prior to attending this meeting Clay attended other meetings with Allied management in which it was indicated that Allied was trying to sell the coke plant. McKnight testified that he was specifically told that the coke plant employees had to sign the Steelworkers card as a condition of employment by Kemp on the second day of December 1981.

Rusen testified that on December 2, 1981 he came to Ashland to hold a meeting with the officers and committeemen of Steelworkers Local Union 1865; and that he informed the local members that (1) Armco was purchasing the coke plant, (2) the accretion doctrine would be applied, (3) the Steelworkers would represent those employees, (4) a supplemental agreement would have to be negotiated regarding these employees, and (5) a "clear understanding had been reached between the Steelworkers Union and O.C.A.W. releasing the O.C.A.W. employees to the United Steelworkers." Rusen testified that he did not tell Local 1865 officers that OCAW had no problem giving up the Local if the Local voted to come into the Steelworkers and that is not what he reported.

On December 2, 1981 a meeting was held at Armco's Ashland Works between representatives of Armco and the Steelworkers. The following is the minutes (General Counsel Exhibit 8) of that meeting:

Memorandum
Special Meeting With Union Re Coke Facility—No. 1
Management Conference Room, Wednesday, December 2, 1981, 11:48 a.m.

Present:	Company	Union
	R.T. Allen	P.E. Thompson, International
	P.M. Bustin	Michael Hewlett [President of Local]
	J.E. Maddox[11]	Emmanuel Mason
	C.M. Shields	Richard Moore

Mr. Maddox explained that he asked to meet with the Union in order to explain to the Union how the Company saw the present situation and to answer any questions that the Union might have that he could answer. He explained that as the Union is aware, the Company announced this morning that Armco had an agreement in principle to buy Solvay. He added this, of course, would have to be approved by both Boards. He commented that Armco was purchasing the assets of the organization and would not be a successor to Allied's agreement with the OCAW.

[ALJ 10]

Mr. Maddox stated as the Company sees it, this would be a separate department of the Ashland Works and the Company would expect to accrete the people into the union that represents Armco people. He commented that the Company would expect to 'Armcoize' the people with respect to Armco benefits, pay rates, etc. He went on to explain that the Company would

[11] Maddox is the Manager of Human Resources for Ashland Works of Eastern Steel Division.

expect to have some type of restrictions for a period on the interflow of employees, etc. He explained the Company was also thinking in terms of a probationary period such as presently exists in the Contract. He stated the Company would not intend for these employees to come in and immediately deplete the SUB fund but would in fact have to have two years of service at Armco first before being eligible.

Mr. Thompson stated that it would seem the Company is saying that these employees would have to acquire the 52 credits. Mr. Hewlett stated that it bugged him when the Company tells the Union that it is going to incorporate the people into the Union. He added he understood that the Company could buy and sell and that was the Company's business but the Company could not buy people into the Union. He stated that in effect the Company is telling the Union what it is going to do and that did not sit well with him. He asked if they would carry their seniority in that they had heard that these employees would. Mr. Mason interjected that the position of the Grievance Committee is as follows: (1) The employees would be welcomed but the Union did not want them to carry their seniority but be treated as new employees; and (2) the Union did not want their jobs and did not want them to take our jobs. He added he believed this was the position of most 1865 members.

Mr. Maddox replied that he would hope the parties could reach an agreeable solution to that issue. Mr. Moore informed the Company that the Union received a telephone call just before they came down to meet with the Company and were informed that there would be a 520-hour probationary period and there would be a one-year transition period, etc. He added they had not been informed of anything. Mr. Maddox responded that is what the Company wanted to talk with the Union about at this time. Mr. Hewlett com-

mented that he hated to be the last one to know anything. Mr. Maddox pointed out that until there was a handshake on the deal, there was nothing except two men talking.

Mr. Mason stated that Mr. Rusen had told the Union that he was informed in a 30-minute meeting in Pittsburgh that the OCAW International had no problem giving up the local if the local voted to come into the Steelworkers Union. He added that the OCAW had then called and wanted to have a meeting at the Steelworkers Building. He asked what these employees had been told that would make them want to join the USWA. Mr. Maddox replied that as far as he was aware, they have been told nothing. He added the Union was aware of part of the package that the Company would propose putting together. He added that legally the Board of Directors has to meet and confirm the sale, which has not been accomplished at this point. He went on to explain in the last few days the parties have tried to iron out some of the details.

[ALJ 11]

Mr. Hewlett asked if the Company were saying that we, locally, had no say; that it was coming down from above and that was the way it was going to be without any local discussions. Mr. Maddox replied in the negative. He stated that he could not tell the Union what the OCAW was meeting about. He added that he was sure Allied had met with them and told them what was discussed as recently as yesterday afternoon in trying to put the deal together.

Mr. Thompson asked what the Company wanted to discuss with the Union. Mr. Maddox replied senioritywise the Company would propose that once these employees become Armco employees, they enjoy as much seniority as they have had. He added the Company would propose that once they come in, we place

some restrictions on transfers, etc. Mr. Moore replied that the Union would counterpropose that these employees come in just like the Marion employees—as new employees. Mr. Maddox commented that he was not aware of all the legalities on accretion, etc., but they were bringing jobs with them and the Company would propose to fold them in under that condition.

Mr. Mason pointed out that Mr. Rusen had talked about a 2-year period but the Company was talking about a 1-year period. Mr. Maddox replied the Company was not sold on any particular time period. Mr. Mason pointed out that the coke oven jobs were probably not the best jobs and these employees would probably want out. He stated at the same time he was sure our people would want some protection.

Mr. Maddox pointed out that the Company was not interested in treating these employees as second-class citizens, to which Mr. Mason concurred. Mr. Allen pointed out that the parties needed to keep the Consent Decree in mind when determining what can or cannot be done. Mr. Mason commented that he believed the parties could do a lot of things. He cited the 18 months the Union gave away in the Pipe Plant as an example of what could be done. Mr. Mason added the Union would really have problems if the Company tried to give these employees all their seniority. He added they have worked hard to make the Union and Ashland Armco a success. He pointed out that these people are a different breed and everyone was well aware of that.

Mr. Thompson explained that what he heard this morning was the first he had heard of the matter. He stated that from what he had heard, the question of seniority could be a real stumbling block. He added they hear that Solvay has been told that they would have this, that, and the other. He asked what they

had been told they have and what they have been told they don't have. Mr. Maddox replied that as he sees it, that would be for the local parties to resolve. He explained that to his knowledge what they may have been told is what was discussed with Allied officials yesterday. Mr. Thompson asked if that included integration of seniority. Mr. Maddox replied in the affirmative. He explained that Armco told them what it would propose, etc., but that was still for local parties to reach

[ALJ 12]

understanding. He reiterated that there may be some legal constraints or something telling the parties what they had to do.

Mr. Hewlett stated the Company is talking about being fair but being fair to whom, certainly not Local 1865. He added that it might be fair to them or to the Company in its sense of fairness but not to the Steelworkers.

Mr. Thompson asked if he could take it there has been no agreement consummated as to the integration of seniority. Mr. Maddox replied certainly none has been reached with the Union. He added that what he is telling the Union is what the Company would propose if it were solely up to it, which obviously it was not. Mr. Maddox pointed out that the Company deals with the Steelworkers Union and not the OCAW. Mr. Thompson pointed out that three of the officers present had told Mr. Rusen exactly what they were telling the Company this afternoon. Mr. Hewlett stated that as far as he was concerned their full seniority would be good for pensions, vacations, etc., but not to be used to compete with Steelworkers. He added they could have an incumbency right to the coke plant. Mr. Maddox stated that the Company's proposal hopefully would satisfy everyone. He added he could see that

it did not satisfy the Union but the other employees would not be very happy as new employees.

Mr. Maddox explained that the Company wanted this meeting to be informative and to tell the Union what it was thinking of. He added this had been done and the Company had also heard the Union's initial reaction.[12]

* * * * *

The parties stipulated that at a meeting on December 15, 1981 at the Ashland Works Maddox informed representatives of OCAW and Respondent Steelworkers that Armco intended to purchase the coke facility from Allied; that Armco would not recognize OCAW as the bargaining representative of the coke facility employees whom OCAW had represented under Allied ownership; and that Armco would treat those employees as an accretion to the Steelworker-representative unit at the Ashland Works and, therefore, recognized the Steelworkers as the bargaining agent of the coke facility employees.

Clay testified that as a member of the OCAW committed he attended a meeting on December 5, 1981 wherein the takeover of the coke plant by Armco was discussed. Those attending included Maddox, Jean Moore, manager of employee relations for Allied, Hewlett and other members of the Steelworkers.

[ALJ 13]

Additional topics discussed included wages and agreements

[12] Hewlett testified that during the period in which the seniority provisions for coke plant employees were negotiated by the Steelworkers and Armco there were no coke plant employees present, and, in fact, none of them were consulted to his knowledge about their desires regarding seniority. Allen testified that with respect to the meetings and negotiations Armco had with the Steelworkers concerning the terms and conditions of employment which were to be imposed upon the coke plant employees, the Steelworkers bargaining team did not contain any representative from coke plant employees.

under the Steelworkers contract, safety program and the probationary period. Clay testified that Hewlett then invited the Allied employees to go to the Steelworkers local hall where members of the two union discussed the 520-hour probationary period and also Allied employees' displeasure of having to go into the Steelworkers. That evening OCAW members called a special meeting which was held at the Steelworkers hall. The membership knew about the 520-hour probationary period. A motion was made that OCAW members make every effort to maintain their OCAW status up to and including legal action. The motion passed by a significant margin. Clay explained that the Steelworkers hall was used that evening because the Local OCAW hall would not accommodate a large turnout. Clay testified that at no time during its meeting with Maddox of Armco did OCAW indicate that they didn't want to be Steelworkers. On the other hand, Clay testified that Armco did not ask Allied employees if they wished to remain members of OCAW. While the employees' chief concern was recognition of OCAW, Clay explained no formal demand for recognition was made at that time because Clay was on layoff and he was afraid to create problems which may have affected his chances of being called back to work. Clay testified that he did not want to be a Steelworker in December 1981 and he did not want to be a Steelworker when he testified herein on August 10, 1983. McKeand corroborated Clay regarding the three above-described December 5, 1981 meetings adding that at the evening session it was also decided that a committee would see an attorney in Louisville, Kentucky, to determine what could be done with respect to not joining the Steelworkers. McKeand also testified that during the meeting between OCAW committee and Steelworkers at the Steelworkers hall he spoke with Thompson and Thompson told McKeand that he understood that Goss had released this group. McKeand replied that that was not what he heard. Subsequently McKeand spoke with Goss who advised him that

absolutely no that he had not agreed to release these people.

Richard T. Allen, a supervisor in Industrial Relations at Armco, testified that as a member of the Task Force established regarding the purchase of the Allied coke plant he attended a meeting on December 5, 1981 in the management conference room in Armco's office building. Kenneth McKeand was present as staff representative for OCAW International. Allen testified that when Maddox stated that Armco intended to purchase the assets of the coke facility and that it was the intent to accrete the employees into the Steelworkers, OCAW did not demand recognition or request bargaining or indicated that there would be a refusal to accept employment with Armco on these terms. It was conceded by Allen that Armco never asked coke plant employees whether they wanted to be Steelworkers or OCAW before it advised them that Armco would not recognize OCAW. And Allen testified that if McKeand or any other OCAW member had demanded recognition on December 5, 1981 he and other Armco representatives were instructed to reject that demand.

McKnight testified that Maddox on December 5, 1981 informed Allied employees present at a meeting that Armco would not recognize OCAW "[a]nd any negotiations would be with the Steelworkers, and it would be a condition of employment that we join the Steelworkers." McKnight corroborated Clay's and McKeand's testimony regarding the above-described OCAW vote at the evening meeting adding that between 350 and 400 Allied employees attended the late afternoon meeting which was advertised in the paper and on the radio and television. McKnight testified that sometime before the end of December the Steelworkers were advised that Allied employees intended to try to remain OCAW.

[ALJ 14]

On December 6, 1981 McKnight had a conversation with Goss who, according to McKnight's testimony, told McKnight that he, Goss, had some discussions with McBride but "the only way he would release us was if it meant we was going to get hurt by him not releasing us, maybe lose our jobs."

The following are pertinent portions of Armco's minutes, Charging Party Bank's Exhibit 11, of a meeting it held with the Steelworkers on December 7, 1981:

> **Memorandum**
> **Meeting of the Negotiating Committee—No. 3**
> **Office Unit No. 1, Monday, December 7, 1981, 1:40 p.m.**

Present:	Company	Union
	R.T. Allen	Michael Hewlett
	P.M. Bustin	Charles Pelfrey
	J.E. Maddox	Donald Stambaugh
	C.M. Shields	Donald R. Stamper
		Earl Tackett
		Absent
		P.E. Thompson, Staff Rep.

* * * * *

> Mr. Hewlett stated he wanted the Company to be aware that the Committee's position is that they are here to protect and negotiate for the 3700 [steel plant] employees, not to protect the other employees. Mr. Maddox responded that they will become Steelworkers in fact if the Company's position is correct and the Union would then be their bargaining agent.[13]

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[13] Former Allied employee Glen Gilbert testified that in December 1981 or possibly January 1982 he met Hewlett in a bar; and that after he asked Hewlett why Allied employees had been ignored and why they hadn't been "in on it," Hewlett said: "[t]here's 3700 of us and 300 or 400 of you all . . . [and] I'm going to look out for number one.

Mr. Pelfrey asked if there was a cutback here, would these employees then be assigned before Solvay employees are recalled. Mr. Maddox responded that in all fairness, the Company would not send our present people up there before recalling laid-off Solvay employees. He pointed out it would not be fair to protect one group and not the other. He added that if Solvay employees could not come down here, then employees from down here should not go to Solvay. He added that the Company was not interested in a sudden interchange of employees between the two. He pointed out that if the parties did not agree on some barrier between the two, then there probably would not be any barriers at all. In reply to a question from

[ALJ 15]

Mr. Hewlett, Mr. Maddox stated that these people would be new employees at Armco but the Company was saying they would bring their jobs and their service with them.

Mr. Stamper asked if Armco takes these people and their jobs are identical to ones that presently exist at the West Works, would those jobs be matched with ours or would there be an attempt to dilute the way things are presently being done at the Main plant. He explained that he was talking about job identity. Mr. Maddox responded that the Company would apply Section 9 as it was applicable. He pointed out the Company would make every attempt to negotiate an agreeable settlement with the Union and the Company wanted to create the greatest job stability possible. He pointed out one reason for this was the number of laws concerning coke oven employees. He explained that the Company would try to keep the jobs from mixing to an extent. Mr. Maddox responded to a question from Mr. Stamper by stating that the Company

would follow the same pattern as far as qualifications are concerned.

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Mr. Maddox stated that the Company felt, from an equity standpoint, that because these employees were bringing jobs with them, they should also bring their seniority. Mr. Tackett asked where that seniority would be exercised. Mr. Maddox replied wherever the parties agreed. Mr. Tackett asked what the Company's plans were or how would the Company want to bring them their seniority into the West Works. He asked if the Company would propose some time ban on moving between the two. Mr. Maddox replied the Company was not locked into a fixed time period. He commented that for vacations and pensions, their entire service would be granted. Mr. Tackett asked if, in regard to vacations, their full seniority would be exercised for allotment or signing for vacations. Mr. Maddox replied that it seemed to him that once the parties agreed that a man could bid, etc., that he should be able to use his seniority for all purposes.

Mr. Maddox stated that the Company would allow the Solvay employees to have recall rights for the length of time which is in their current contract which was, he believed, three years and this would run from the date of layoff. Mr. Stamper asked if employees of the Ashland Works could lose recall rights while employees at Solvay had greater recall rights because they would have three years while Ashland employees might have a two-year limitation. Mr. Maddox responded that if the parties put up some fences to protect one group, the other group would also have some protection. Mr. Tackett asked if the only people going from here to there would be on job assignment. Mr. Maddox replied that as the Company envisioned it, yes. He added the Company did not visualize taking

people from here to there early in the game, although there might be some work such as Shops [maintenance] work which would be done there.

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[ALJ 16]

Mr. Hewlett stated from what the Union had heard, the Company was trying to make a smooth change that the Company thought would make the people happy and cause few problems but it seemed that it was to the advantage of the 300 or 500 [Allied] employees and he reiterated the [Steelworkers] Local's purpose was to protect the 3700 [steel plant] employees. Mr. Maddox responded that what the Company was trying to do was to bring them in so that they could enjoy the benefits of the Contract without denying our people anything. He added that the Company hoped it could convince everyone that they would not have to sacrifice anything.

* * * * *

Mr. Stambaugh asked what problem it presented to give these employees a new Ashland Works date. Mr. Allen replied that he did not know at this point. Mr. Pelfrey commented that he did not believe there was common ground to be reached in this matter. Mr. Stambaugh asked why they should be treated any differently than people from Marion who are here on interplant transfers. Mr. Maddox pointed out that these employees do not bring jobs with them, that they are simply at the head of the line as far as hiring is concerned. He stated that in his mind this situation was different. Mr. Hewlett replied that it was not really different in that the Company bought the plant and jobs; therefore, the Solvay employees are not really bringing jobs with them.

Mr. Hewlett asked why not use the existing writing on the manning of new facilities. Mr. Maddox replied that he had not studied that to see if it were applicable. Mr. Hewlett replied that it definitely covered the situation and he would like to see it considered.

Mr. Hewlett stated that if everything went as the Company envisioned it, these employees would become Steelworkers. He stated that if the laid off people decided to strike, they would picket both here and the Coke Plant. Mr. Maddox pointed out that until these employees return to work, they were neither Allied nor Armco employees. Mr. Hewlett stated the Company was well aware of these employees and the way they were. He pointed out that if one goes out, they all go out. He asked if, this one department of Armco went on strike, would the Company then expect the rest of the Steelworkers to cross a picket line. Mr. Maddox replied that if it was a wildcat strike, yes he would expect them to cross the picket line.

Mr. Stamper asked if a situation were contrary to the way it was done at the Ashland Works, would the Company try and change things. He cited an example as a Welder being a Welder, a Pipefitter being a Pipefitter, etc. He asked if the Company would try and use it as a proving ground. Mr. Maddox replied it would be a tremendous administrative problem to go back and forth. He explained that at our other coke facility they try to keep enough people there to keep people from going back and forth. He pointed out that one of the problems the Company had was because of OSHA medical requirements, etc. Mr. Hewlett asked what about sending a Pipefitter, Welder, Rigger, etc. He said one of these employees might go up there and not go again for several weeks. Mr. Maddox commented that at the

[ALJ 17]

other coke facilities they try and send the same people every day; otherwise everyone became covered by the medical requirements. . . .

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Mr. Hewlett asked when Mr. Rusen or the International was notified about Armco's intent to have Solvay employees become Steelworkers; whether this was weeks or months ago. Mr. Maddox replied that he was not positive, but he believed it was within the last few weeks. He pointed out that this was part of the accretion procedure. The parties agreed that Mr. Maddox would contact the Union concerning the scheduling of the next meeting which would probably be tomorrow afternoon.

The following are pertinent portions of Armco's minutes, Charging Party Bank's Exhibit 12, of a meeting it held with the Steelworkers on December 8, 1981:

Memorandum
Meeting of the Negotiating Committee—No. 4
Office Unit No. 1, Tuesday, December 8, 1981, 2:00 p.m.

Present:	Company	Union
	R.T. Allen	Michael Hewlett
	P.M. Bustin	Charles Pelfrey
	J.E. Maddox	Donald Stambaugh
	C.M. Shields	Donald R. Stamper
		Earl Tackett
		Absent
		P.E. Thompson, International

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Mr. Pelfrey asked if the Company was going to rec-

ognize these employees' status as Electricians, Millwrights, and Craft employees, etc. Mr. Maddox stated that he did not know how tough the maintenance requirements were in the operation of a coke facility but it would be hard not to recognize their present status as craftsmen of one type or another. Mr. Pelfrey asked if these Maintenance employees would be put through another apprenticeship. Mr. Maddox answered in the negative and added that there could possibly be some retraining of craft employees in that they may not have the versatility that our present Assigned Maintenance group has. He added that their idiosyncrasies, knowledge, and familiarity with the coke producing facility would be a great benefit to its continued operation. Mr. Tackett stated that many of these employees have received training on the job. Mr. Maddox stated that he understood that the purchase of the Coke Plant was creating considerable trauma regardless of the details but he had hoped that we would cause as little a ruckus as possible in implementing a Steelworkers seniority system.

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[ALJ 18]

Mr. Pelfrey asked if the Company was going to seek any input from the Negotiating Committee. Mr. Maddox answered that the Company would submit a proposal with regard to a new seniority system at the coke department; however, the Company had not completed this particular proposal. Mr. Stamper asked how the Committee would know what to agree on since they had no present knowledge about a coke facility. Mr. Maddox admitted that he had only been in the coke plant once in recent years and that the negotiating committee's knowledge base did not lack much more than the Company's at this particular point in time. He went on to say that it is hoped that Armco

personnel could get in there before too long and look at the facility and it was his hope that the negotiating committee would join the Company in that tour.

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Mr. Maddox read Paragraph 4 of the draft and stated that in essence this was proposing a complete line of demarcation between present Ashland Works employees and present Allied employees until July 1, 1983. He stated that neither of these groups would have transfer rights as such until that time. Mr. Stamper asked if there would be two shops or two maintenance departments or organizations at the coke plant. He continued by saying that some of the people cannot do some of those jobs when it came to our shops trying to work at the Coke Plant. He stated that if Armco shop employees have the talent to go up there and work then Local 1865 should not be fenced out of the Coke Plant. He stated that if this operation is similar that maintenance employees should be able to go up there to work. Mr. Maddox stated as he saw it, there would be no movement due to transfers until July 1983. In other words, there would not be any competition for permanent vacancies between the two groups until that time.

Mr. Stambaugh asked if the Company had ever looked at an incumbency situation to the jobs at the Coke Plant, accompanied by a January 1, 1982 Ashland Works service date. Mr. Pelfrey stated that once an employee transferred under that situation, he would bring a January 1 service date to the West Works. Mr. Allen pointed out that would be the equivalent of departmental seniority. Mr. Maddox stated that he was not sure that an incumbency was a proper answer to the problem at hand, nor was he sure that it would be acceptable by the Audit & Review Committee. Mr. Pelfrey stated that the coke facility employees were

merging with the West Works and it wasn't the case the West Works was merging with them. Mr. Tackett stated that the negotiating committee could not agree on granting these employees their full continuous service in 1983 to compensate on a plantwide basis. He stated that he could honestly say that he could not sign that kind of memorandum even though some of the employees say they wouldn't want to come down to the West Works under any situation. He stated that his life would be on the line if he signed something to the effect that these employees could come down here and displace present workers at the Ashland Works. Mr. Hewlett concurred by saying that the coke plant employees were complete

[ALJ 19]

outsiders and should never displace anyone at the Ashland Works. Mr. Stambaugh asked what was wrong with an incumbency. Mr. Allen stated that the parties have met with trouble when approaching the A & R Committee on the subject of incumbencies. Mr. Allen posed the question about an Ashland Works employee who goes to the coke facility in 1983 and asked what about his service date. Mr. Maddox stated that Allied presently has some 1978 and 1979 employees on layoff.

Mr. Pelfrey explained that it looked to him as though Armco was taking a reverse position compared to their position in the negotiating meetings concerning the new pipe mill. He pointed out that in those discussions, Armco would not call the pipe mill a department. Mr. Pelfrey stated that he knew what the Company's job was in this case but the Negotiating Committee must protect the present employees of the Ashland Works. Mr. Stamper stated that he would not like to play poker with Ed Maddox. He stated that Mr. Maddox said close the door on the lower

end of the mill for employees to go there based on seniority when the tube plant opened and in this case he had opened the door on the east end of town for employees who never had worked a day for Armco. Mr. Tackett explained that these talks should be taking place as if there were no employees at the Coke Plant. Mr. Hewlett stated that the coke employees should come into Local 1865 in the same fashion as the [Armco] Marion [Ohio] employees had under their Regional transfer proviso of the 1980 Basic Agreement. Mr. Maddox stated that the difference in this case was that the Allied employees were bringing jobs with them and they were not new employees to those jobs.

Mr. Stambaugh stated as he saw it, the problem with this would be working on Labor Reserve. Mr. Maddox stated that this is a different case than it would be if Armco was going out and hiring 400 new employees. Mr. Pelfrey stated that the 520-hour probationary period tells him that these are new employees. He continued by saying that it seemed like Mr. Maddox was just picking the cherries out of the pie and he could not understand that.

Mr. Stambaugh pointed out that Mr. Maddox had stated that Armco did not buy the contractual agreement from Allied. Mr. Maddox stated that was correct, however, those employees have had those jobs for years and he did appreciate what the Union was saying if you take all the worst examples that are possible here. Mr. Pelfrey stated that seniority was a very sticky point with the negotiating committee.

Mr. Tackett asked Mr. Maddox to look at it from the Union's side. He stated that at present there are 3700 of 'us' and only 300 of 'them.' Mr. Maddox repeated that the Allied employees would be bringing a job with them. He went on to say that everyone of them

was going to be matched to an existing job at the Coke Plant and when one of the Allied employees comes to work for Armco, one of the West Works employees is not going to leave the plant and go home.

Mr. Tackett stated that the Union could possibly agree with the recall period of two years and an Ashland Works service date of

[ALJ 20]

January 1, 1982. He stated that with respect to the merging of seniority, it was unthinkable to the Negotiating Committee at this time.

* * * * *

Mr. Tackett suggested that Armco treat all the coke employees as new hires and let the present employees of the Ashland Works have their privileges due to the fact that coke employees would have a January 1, 1982, service date. He continued by saying that if West Works employees wanted to go up there, okay. He stated that Local 1865 rules the roost here and at present they were being imposed upon. He continued by saying for once that if anyone has the upper hand, it is Local 1865 and their Negotiating Committee. He added that from the phone calls he was receiving, that the Coke employees would settle for that. Mr. Maddox asked if Armco was taking 3-400 employees from the West Works to the coke department and he wrote an agreement to that effect, would the negotiating committee espouse the same attitude. (At this time the Committee agreed that they could guarantee that.)

Mr. Hewlett stated he was not an OCAW representative but instead he was an USWA representative. He stated that a new employee under our agreement hires in, he learns it, and then he earns it. He added

that these employees were not bringing jobs since Armco had already bought the jobs. . . .

* * * * *

Maddox distributed a draft of a document to the members of the negotiating committee at the above-described meeting on December 8, 1981. The document, titled Memorandum of Understanding between Armco, Inc. and the United Steelworkers of America, is three pages long, and contains three unnumbered paragraphs and nine numbered paragraphs. Charging Party Bank's Exhibit 8. The fourth numbered paragraph reads as follows:

> 4. In order to avoid dilution of experienced Coke Plant employees or disruption of any operation at the Ashland Works, no employee will be permitted to transfer out of the Coke Department facility before July 1, 1983. Thereafter, the transfer of such employees will be limited during any 12-month period to 25% of the average number of employees actively at work the previous year. This provision will not preclude the Company from assigning Coke Department employees to another seniority unit at the Ashland Works or to assign an Ashland Works employee to the coke making facility provided that the rights of laid-off Coke Department employees as specified in Item 3 are not unduly abridged.

The following are pertinent portions of Armco's minutes, Charging Party Bank's Exhibit 13, of a meeting it held with the Steelworkers on December 10, 1981:

[ALJ 21]

Memorandum
Meeting of the Negotiating Committee—No. 5
Office Unit No. 1, Thursday, December 10, 1981, 3:15 p.m.

Company	Union
R.T. Allen	Michael Hewlett
P.M. Bustin	Charles Pelfrey
C.M. Shields	Donald Stambaugh
	Donald R. Stamper
	Earl Tackett
	Absent
	P.E. Thompson, International

* * * * *

Mr. Allen stated that without agreement in these sessions, Armco may take the option of acting unilaterally with full service for the present Allied employees. Mr. Stamper asked if this would be done through accretion without 520-hour probationary period under the Basic Agreement as of Day 1. Mr. Hewlett stated that he thought maybe Armco had erred in its way with respect to applying the accretion doctrine to this sale. Mr. Allen stated again that there is a possibility that without agreement the deal could still collapse. Mr. Stambaugh stated that he questioned whether the parties were within their rights negotiating on this subject. Mr. Allen stated that yes the parties are legally able to negotiate for prospective or new employees. Mr. Pelfrey asked about the threats of suits by the OCAW. Mr. Allen stated that according to his information, these proceedings and negotiations and talks were completely legal.

Mr. Stamper stated that the Company was in different shape than the Negotiating Committee. He stated that he did not think the Company was considering what it was doing to the Negotiating Committee and that the Negotiating Committee has not said they were negotiating on behalf of those employees.

* * * * *

Mr. Hewlett asked why the parties needed to agree by December 15 [on the Memorandum of Understanding] if the deal was not to be final until December 28. Mr. Allen stated that time was needed for Armco and Allied to act after the details had been worked out. He stated that even if the local parties were to agree on something by the 15th, there still is a possibility that the sale would not be consummated. Also, there would be several details worked out before the December 28 deadline. . . .

Mr. Allen stated that in reference to Paragraph 1 of the proposal concerning staffing during the first month or so of operation because of the lines of progression and jobs, etc., the Company is not positive whether the numbers involved will be the same. . . . He asked if the Union had thought about lines of progression. Mr.

[ALJ 22]

Hewlett replied that it was almost impossible for them. He pointed out that he was not aware of what jobs they had, etc.

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Mr. Stambaugh commented that when his father passed away, no one would work on the ovens. He commented that somehow people on the ovens get an extra 30 cents per hour on their pensions. He stated he was not fully aware of the procedure. Mr. Allen explained that most of his thinking was long the lines of having a self-contained department.

* * * * *

Mr. Allen asked if the parties reached an impasse on the seniority issue and it went in with full seniority, weren't the parties better off to reach agreement on

the other issues. Mr. Hewlett replied in the negative. He pointed out that seniority is everything and if they don't have that, they have nothing. . . .

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On December 13, 1981 Clay attended a meeting with OCAW District Director Williams. OCAW Local 3-523 union committee was present along with McKeand. Clay testified that officers of the Local wanted to file grievances protesting the conditions of the sale. Williams advised them that he was attempting to reach Goss. According to Clay, Williams never did "actually get back with us on it."

The next day Rusen called McKeand. Rusen indicated to McKeand that the 520-hour probationary period would be taken out of the agreement, that a problem regarding pensions for people who were on leave of absence could be worked out, and that dovetailing the seniority of Allied people at Armco could be worked out by treating a department seniority setup which would protect OCAW and Allied employees and Armco employees to both their satisfaction. Rusen testified that in the second part of the conversation he indicated that he believed that all the differences that existed in the agreement could be worked out but McKeand stated no I don't believe that's true and he went on to say that "[w]e still think they ought to be members of O.C.A.W." Rusen testified that he asked McKeand if he was aware that Goss had released the OCAW employees to the Steelworkers. McKeand said that he had not been told that. Rusen asked McKeand to contact Goss and he indicated to McKeand that he would contact McBride to clear this matter up. McKeand testified that on some unspecified date before December 31, 1981 he received a phone call from Rusen who advised McKeand that he Rusen had met with Armco and reached an agreement with them regarding the people at the coke plant and he asked McKeand to sign it. McKeand informed him

that he could not. McKeand then called Robert Wages who is the assistant to President Goss. After McKeand explained what occurred. Wages said "tell him to take it and stick it in his ass." McKeand unsuccessfully attempted to contact Rusen.

Wages testified that in mid-December he had a telephone conversation with McKeand who had called the office to talk to Goss and since Goss wasn't available Wages took the call. McKeand said he had a problem in that the

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Steelworkers had apparently negotiated some kind of an agreement with Armco with respect to the treatment of OCAW members employed at Allied. McKeand told Wages that Rusen had called him and said he, Rusen, felt that something OCAW could live with was worked out and Rusen asked if OCAW would sign the agreement. Wages testified that McKeand asked him what to do and he told McKeand to tell Rusen or anybody else who inquired "they could take the agreement and stick it up their ass." Later that day Wages informed Goss of this conversation and he suggested to Goss that someone should contact McBride and "get him off that crap."

Subsequently Goss telephoned McBride. Wages was in Goss' office and overheard Goss' side of the conversation. Goss testified that he told McBride after a general discussion about labor problems, that the purpose of his call was to find out why "[w]e couldn't get anything started locally here between the two unions." McBride said that he would get back to Goss on the matter. Goss testified that during this telephone conversation he did not tell McBride that he was releasing OCAW members who were employed at the coke plant at Ashland unconditionally without any reservation whatsoever; that he didn't hint anything of that nature and "[i]f we had a discussion on that, it was in my mind with what I have said consistently;" that "[i]f once we had coordination here at the

local plant level and everything could be worked out, I would consider releasing them subject to our internal procedures"; that he did not have knowledge of the contents of the labor agreement between Armco and the Steelworkers which was effective at that time, and had never seen the agreement; that at no time did he tell any official of Armco that he was releasing OCAW members who were employed at the coke plant, and at no time did he tell any officer of the Steelworkers, including regional directors or local union officer, that he was unconditionally releasing his members who were employed at the coke plant; that OCAW has specified procedures for releasing members; that he read accounts of the steel industry settlements so he knew generally at least what the wage package and pension package was in the steel industry; and that after he spoke to McBride he did not believe that he called Rusen but it was possible that thereafter he did speak on the telephone with Rusen. Wages testified that between the middle and the end of December 1981 he overheard Goss' portion of a telephone conversation between Goss and McBride. According to Wages, Goss thanked McBride for returning the telephone call. They discussed economic problems that the Steelworkers and the OCAW were confronted with and then Goss said: "look the reason why I called is we have a problem" and then he went on to describe the nature of the problem at Ashland and solicited McBride's assistance in getting some cooperation from the local folks. Wages testified that during the telephone conversation between Goss and McBride, Goss told McBride OCAW was concerned because Armco has apparently taken the position that they are not going to recognize OCAW and we can't find out anything about what's going on between the parties. Wages testified that the next thing that came out of Goss' mouth which really ended the conversation was "thanks I'll be looking forward hearing from you." Wages testified that at no time did he hear Goss in any way shape or form say that he was

unconditionally granting a release of the coke plant employees to the Steelworkers; the word "released" was not used and there was no discussion by Goss with respect to giving up members, releasing members or anything of that nature. Wages testified that after the conversation was over Goss commented to him that he didn't think President McBride knew he had a plant in Ashland.

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McBride testified that he became aware that Armco was interested in acquiring a coke facility at Ashland sometime in November or late October 1981 from Ball; that a week or two later Goss called McBride and Goss told McBride "that he'd thought the matter out and that he was aware of the contract that we had, and it was a better agreement in terms of wages and benefits than had existed at the coke plant under Allied," and Goss said "he felt in the long run the employees of the coke plant here would be better off under our union and—and working for Armco"; that

> "there was a further discussion about the subject of accretion and it was his feeling that the employees of Allied would be confronted with a choice that might result in Armco simply taking the facilities and not the employees, and that it would be far better for them to maintain their position and their employment by accepting the fact that they would now become employees of Armco and be merged into the bargaining unit, of the Armco plant at Ashland";

that Goss did not attach any conditions to what he told McBride; that it was then left up to Ball to pursue it and McBride did not recall that he did anything in particular about it after that; that he did not make any internal memorandum of his telephone conversation with Goss; that he did not tell Goss what the position of the Steelworkers would be with respect to seniority of the former Allied employees because he did not know what the position was;

that he did not write a letter to Goss thanking him for these new members; that there was no document in the Steelworkers possession confirming the telephone conversation he had with Goss; that Goss did not indicate that the wishes of the Local Union would have to be taken into account in his decision; that there was no detailed discussion of the two contracts; and that as President of the Steelworkers he would not give up a local without knowing whether their seniority, their jobs, and their benefits would have been protected. McBride is not credited.

The following are pertinent portions of Armco's minutes, Charging Party Bank's Exhibit 14, of a meeting it held with the Steelworkers on the morning of December 15, 1981:

Memorandum
Meeting of the Negotiating Committee—No. 6
Office Unit No. 1, Tuesday, December 15, 1981, 10:10 a.m.

Present:	Company	Union
	R.T. Allen	Michael Hewlett
	P.M. Bustin	Charles Pelfrey
	J.E. Maddox	Paul Rusen, District Director
	J.H. Wallace	Donald R. Stamper
		Donald Stambaugh
		Earl Tackett
		P.E. Thompson, International

The meeting began with Mr. Rusen's request that the parties recess for 5 or 10 minutes.

Mr. Rusen stated that since he had called and requested this meeting, he would appreciate it if Mr. Wallace would walk him through the series of events that led up to this matter. He added

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that he had some questions since he and Mr. Wallace had met in Pittsburgh some weeks ago.

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Mr. Wallace referred to the fact that OCAW was not being recognized and explained that this was to minimize exposures. He stated that Armco did not want to deal with two unions and two expiration dates and end up with the tail wagging the dog so to speak. He added that there was also a risk of shutdown with or without the Experimental Negotiating Agreement.[14] He went on to explain that another reason for purchasing the plant is cost competiveness of the Ashland Works operations. He continued by saying that as a department of the Ashland Works, the coke would be purchased at cost and would ultimately decrease the hot metal cost in the steelmaking end of the business. He went on to say that the Coke Plant was going to run wide open and utilize about 400 employees at full production which represented about a 10% increase in jobs at the Ashland Works.

Mr. Wallace stated that there are some other considerations; one of which is the labor/management situation and the biggest question there as he understood it, involves seniority. Mr. Wallace stated the Union may ask why Armco gave those employees from Semet-Solvay anything. He stated there are two reasons for that; one is we cannot run it without their expertise and experience. He explained that Armco had two choices—one would be to man the coke ovens with people off the street or to man them with people who

[14] See also Charging Party Bank's Exhibit 10, Hewlett's notes of this meeting. Allen testified that the Experimental Negotiating Agreement provided in part that the Steelworkers would not strike over economic issues.

know how to run coke ovens, and the conclusion is obvious. He went on to explain that as of December 29, or the date of acquisition, the coke plant employees would become part of the Ashland Works bargaining unit through the doctrine of accretion and thus become the burden of fair representation for Local 1865. He added this has legal ramifications for the Steelworkers as well as Armco. He went on to say that the Company thinks this is good for Ashland all the way around; for one reason they will have a homogeneous work force and from a practical basis, there are minimum exposures for when it comes to legal consideration. He went on to say that other considerations would be EEOC considerations and pointed out that the minority representation at the Coke Plant presently includes about 9% minority representation when the laid-off employees are considered as part of the group.

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Mr. Wallace explained that he understood there were some sore spots, or what he would call points of concern. He explained that the status of the deal right now, unless something unexpected was to happen is that the deal will be completed by December 29. Mr. Rusen asked if there were any possibility of one of the parties seeking

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injunctionary relief. Mr. Wallace answered that Armco was prepared for that and, in fact, that had been made part of the contingency plan when it was drawn up. He repeated Armco would stop any injunctionary efforts. Mr. Wallace continued by saying that generally what needs to be done here is the question of what is a fair way to handle these employees seniority-wise. He stated the Company is looking for some equitable solution to these problems. He added that

seniority is a permanent issue and it had to be one way or the other. Mr. Wallace continued by saying any agreement reached here must stay within the requirements of the accretion doctrine as it stands. He concluded by saying that these sound like very knotty problems but we were lucky to have such problems instead of a decision being made to close or decrease operations. He stated, if he had a choice, he would rather deal with this type of knotty problems than the opposite.

Mr. Rusen stated that he would like to make a few observations—first of all, whatever happens here the A & R Committee would have to review it. He stated he was not sure in this area because he had made some calls to inquire but received no answer. He stated the No. 1 question he had was, the dovetailing of seniority would seem to be the most emotional issue here, and the Company was saying that all at once 3400 employees were going to be merged with another 400 employees, some of whom had 30 and 40 years service. He stated that also the Union has a question on the trade and craft applications of the maintenance of the Coke Plant. He stated that under the 'silver bullet' or OCAW agreement, the employees cross crafts all the time. He went on to say this presents a thorny situation. He asked whether zones and the CWS would be implemented and asked if the Company were saying that either the Repairman or Maintenance people would be classified or disqualified as craftsmen.

Mr. Wallace stated that he would expect that some would be disqualified; however, the Coke Plant has presented itself as a well-maintained facility. He stated that at the Ashland Works there is a Maintenance Shops Department and an Assigned Maintenance Department. Mr. Wallace stated that because of the geographical and logistical reasons involved, he would not

think there would be a lot of changing around in the maintenance set-up all together. He added that Riggers, Pipefitters, and Welders would be sent to this department just as they are in Ashland Works today.

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Mr. Rusen began by saying that his next question was not a contractual question but it concerns the International and Local Union and at present time is a well-discussed subject around the community. He added that this question deals with the history of the coke ovens and the employees working there. He stated that those folks have a bad habit of setting up picket lines and he wondered if Armco had given that consideration. Mr. Wallace answered by saying that Armco surely had given that consideration and acknowledged that the Coke employees did have a recent bad history with respect to picketing. He added that Armco did not want

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nor did it anticipate that a wildcat situation would develop. He added that his guess would be that some of the employees are very close neighbors of Ashland Works employees and, in fact, some would be cousins and relatives. He explained that he would assume that the United Steelworkers of America knew that Armco knew how to deal with wildcatters.

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Mr. Wallace stated that it was a lot of supposition on his part but he would imagine that the Allied employees are as happy as they could be that Armco is the prospective buyer. He stated that if they had to pick a buyer for that Coke Plant, he would guess they would pick Armco. Mr. Rusen stated that he just needed to bring that point to Mr. Wallace's attention and added that the group at the coke plant has been

known to get wild at times. Mr. Wallace stated that he could not disagree but he would point out that they were also represented by a different labor organization, one which was not quite as mature or as old as the Steelworkers, nor was it as sensible as the Steelworkers about labor/management ideas. He went on to say the parties have joint responsibility here and there would be a lot of changes at the Coke Plant; for instance, lines of progression, and no more morning shape-ups. Mr. Rusen stated that the 'silver bullet' also contains a lot of goodies. Mr. Wallace said that he did not recognize the 'silver bullet.' Mr. Stamper stated that by recognizing the 3-year layoff writing in the 'silver bullet,' the Negotiating Committee would be throwing the present Ashland Works employees to the wolves. Mr. Wallace stated that he had not said it would be easy.

Mr. Wallace asked if his response on the question about trade and craft had been adequate. Mr. Rusen stated that he would have to clarify his position within his own committee. Mr. Wallace stated that he was somewhat surprised that the Union was objecting to the 3-year recall writing versus the 2 years. Mr. Tackett stated that he realized that these employees would soon be bargaining unit employees but he pointed out that the Committee's consensus is that they have not contributed anything to the Ashland Works up until this point of time and that this Committee must be concerned with Ashland Works employees; in other words, its own people.

Mr. Wallace stated that he would like to talk about Armco strategy in this acquisition. He stated that first of all, Armco will not recognize the OCAW. He went on to explain that secondly, those employees will all be represented by the United Steelworkers of America and its preference is to have one bargaining unit. Mr. Wallace continued by saying thirdly, that both parties

must be aware of Board charges. He went on to explain that we must look at this very closely and try to come up with an equitable solution; one that does not give any particular group a rallying point. He acknowledged that the Steelworkers would rally behind the issue of seniority and as he knew it, the OCAW

[ALJ 28]

employees would rally behind the issue of recall. He stated that as it stands today, the OCAW employees have a recall period of three years in their pocket and that would be for recall to that plant only. Mr. Wallace continued by saying that he is open for suggestions but his main concern here is that no one ends up with a flag to carry, which would cause someone to take a notion to stop any operations. He went on to say that another thing the parties have been working on is trying to iron out the pension agreements. He pointed out that there was a difference in the agreements and that these meetings were continuing.

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At this point Mr. Wallace stated that he would like to pass out a draft of a Memorandum of Understanding prepared by the Company. Mr. Hewlett stated that throughout these meetings and throughout the writing that has been proposed, all he is hearing or seeing is equities for 400-500 people when in fact there were not equities for the 3400-3700 Ashland employees. Mr. Hewlett continued by saying that Steelworkers are not crude, they do want the jobs but they also want to protect their present employees. He stated that in these meetings he is not hearing that concern expressed before Local 1865 in any shape or form. He went on to say that he understands that

nobody wants any hard feelings but in his opinion there is no equity and he wanted to make that clear. Mr. Wallace stated that he heard and understood Mr. Hewlett's opinion but that he thought he was wrong. He went on to remind Mr. Hewlett not to forget the dollar input that is involved here and what it means for all Ashland Works employees. He went on to say that what he was looking for here was a way to bring them under this Basic Agreement.

Mr. Stambaugh asked what was wrong with a January 1, 1982 date, just like Marion employees. Mr. Wallace pointed out that the coke employees were bringing jobs with them, not just warn bodies. Mr. Stambaugh stated that nobody at the Ashland Works wanted any of those jobs, so he didn't see any difference. Mr. Rusen stated that he too would take strong exception to the fact that the Company thinks the coke employees are bringing jobs with them. He stated that Coke Plant jobs historically and presently are not attractive jobs and most times are treated as entry level jobs into an integrated plant. He continued by saying that these employees would probably escape the Coke Department as soon as possible and force the present Ashland Works employees to go up there and work either from Labor Reserve or some place else. He concluded by saying that the coke employees are not bringing jobs but that Armco was bringing the jobs to them. Mr. Wallace stated that in some of the experiences he had had and some that were studied, to his surprise also, these employees did not want to leave the Coke facilities; however, the parties will have to wait for 8 to 10 years to know who was right in this particular case.

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[ALJ 29]

The following are pertinent portions of Armco's minutes, Charging Party Bank's Exhibit 15, of a meeting it held with the Steelworkers the afternoon of December 15, 1981:

Memorandum
Meeting of the Negotiating Committee—No. 7
Office Unit No. 1, Tuesday, December 15, 1981, 2:00 p.m.

Company	Union
R.T. Allen	Michael Hewlett
P.M. Bustin	Charles Pelfrey
J.E. Maddox	Paul Rusen, District Director
J.H. Wallace	Donald R. Stamper
	Donald Stambaugh
	Earl Tackett
	P.E. Thompscn, International

Mr. Wallace began by saying the Union's suggestion that coke plant employees received an Armco service date and an Ashland Works service date while at the same time Ashland Works employees receive a Coke Plant service date along with their present service did not strike him as legal or acceptable under the Consent Decree. . . .

* * * * *

Mr. Wallace proposed that the coke department employees receive a service date of 12-29-81 for purposes of cutback and promotion at the Ashland Works and at the same time they be assigned an Armco continuous service date which corresponded with their Semet-Solvay service. He went on to say at the same time, he would propose that all the laid off employees from the coke plant should also receive a 12-29-81 service date. . . . Mr. Wallace explained that a new memorandum was being typed at this moment. Mr.

Rusen stated that if the new memorandum explained or depicted seniority as Mr. Wallace had described it, that the Union could agree in principle.

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Mr. Rusen stated that the 3-year layoff issue was resolved with the new seniority date alignment. He went on to say that the 520-hour probationary period was still a very, very emotional issue with those folks. He stated that without a 520-hour probationary period, he would see the employees with bad records as bringing them with them and living with them and the employees with good records as okay and living with their good records. Mr. Wallace said he would talk about the 520-hour probationary period. He stated that by reputation the coke plant employees are a bunch of bad actors and they have had their problems. He pointed out that Armco has a lot to get done in order to get that plant running again, including no more morning shape-ups, wildcats, or shootings. He pointed out that the 520-hour probationary period gave Armco an opportunity to say to that group behave. He stated that he would still have to admit that he has some fears in this area; for example, when the lines of progression are put into place, there may be a poor reaction. He

[ALJ 30]

went on to say that when the rates are put into place there are going to be some losers—there will be some winners but there are going to be some losers. He pointed out that there would be a last time shape-up necessary to get everybody established on a job. He added, and made it very clear, that any bulling or any type of slowdown would not be tolerated by Armco. Mr. Wallace stated that without the 520-hour probationary period, these employees would have to bring their personnel records with them and for ex-

ample, a man with a last chance memo would still have a last chance memo and he would bring it with him. Mr. Wallace stated that he was confident that his hunch that this problem could be straightened out would prevail, since this was a two-way street.

Mr. Rusen posed a question about the pension paragraphs; specifically 6.1, 6.2, 6.3, and 6.4. He stated that he would have to have someone from the International look at these paragraphs. Mr. Wallace stated that probably the only issue they would have a problem with would be whether or not the pension would be a split check or one check. He stated that both companies are using the same actuaries and they are just arguing between themselves on the rate of interest. Mr. Rusen stated that he could probably initial this document and subject to review of the pension paragraphs, perhaps the parties could sign the agreement tomorrow. He went on to say that leaves one outstanding item which was Thompson's Navy and explained that they had an IUD pension. Mr. Wallace stated that Armco would recognize the present Steelworkers that ran the dock facility. He added that at present there are only two employees in each of the two bargaining units for a total of four employees and two bargaining units.

Mr. Wallace stated that without 520-hour probationary period the personnel records of the coke plant employees would come with them.

Mr. Wallace stated there was a need to discuss how the parties should proceed from this point. He stated the parties must meet with the Solvay employees and suggested that the group that met on Saturday, December 5, meet again. He went on to explain that Allied Management was the only communication these employees had received up until now and thought it best that Armco Management should meet with the

Union President and discuss the agreement that has been reached.

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The meeting concluded by the parties initialing and signing the final draft of the Memorandum of Understanding and expressing that the parties had tentatively agreed to this document as a Memorandum of Agreement subject to review by the Steelworkers International of the pension paragraphs; specifically, 6.1, 6.2, 6.3, and 6.4 The parties stipulated that on December 15, 1981

representatives of Armco and the Steelworkers executed a Memorandum of Understanding (See General Counsel's Exhibit 4.); and that the Memorandum of Understanding had been negotiated over the period December 5 through December 15, 1981.

[ALJ 31]

Regarding the Memorandum of Understanding, Allen testified that initially Armco intended to give new employees who were former Allied employees the same service date that they had with Allied but the final agreement was that they would receive a new service date of December 31, 1981, which was the date of acquisition, and that Armco retreated from its position that the probationary period of 520-days should be required.

Rusen, with respect to the Memorandum of Understanding, testified that he wrote on page 1 upper left hand corner "OK PRTA," which stands for OK Paul Rusen Tentative Agreement, because of his conversation with McKeand the night before and not because the Steelworkers reserved the right to have the International review the pension agreement. Rusen testified that he advised Wallace that there seemed to be some lack of communication between Goss and McKeand and he wanted the matter cleared up before he entered into an agree-

ment. Rusen testified that he called McBride on the morning of December 15, 1981 or later that day, and McBride indicated that he would get back to him. According to Rusen, the purpose of the agreement entered into on December 15 was an understanding between Wallace and Rusen that there would be no interaction of seniority between coke oven and steel works until all the employees from OCAW were recalled to the coke oven, which was later clarified by a letter of understanding.

Rusen testified that on December 17, 1981 he received a call from Goss who said "Well there must be some—something wrong because they are releasing the people to become members of the Steelworkers Union." Also, Rusen testified "He [Goss] said if they didn't Armco would not hire those people. They would be terminated. And in the best interest best representation to those people he was releasing them to the Steelworkers Union." Rusen testified that on December 17, he made a memo of this conversation, Respondent Union's Exhibit 7, which is undated and refers to a conversation with Mr. Gossett, President of OCAW. The memo indicates "As per my discussion with . . . Ball, I contacted Mr. Gossett." The memo also indicates that Mr. Gossett had indicated to Rusen that he was very reluctant to release the members at Allied but that he feared Allied would terminate all the employees before the sale to Armco and, therefore, he indicated that he would release the Allied employees to the Steelworkers. According to Rusen's testimony, Goss did not attach any conditions to the release of this unit to the Steelworkers. Rusen testified that at some unspecified time after the 17th he called Wallace and told him that the agreement was in place. Also on the same date he called Staff Representative Paul Thompson and told him that the agreement was in place and that he Rusen cleared again the question with Mr. Goss about the representation "and that there were several things that then had to be implemented on the agreement and other details to be worked out."

Specifically, there was a question of incentive coverage, a question of job descriptions, lines of progression, and the question of former employees of Allied becoming members of the Steelworkers. Also there was a question of dues and initiation fees. Regarding the latter, it was determined that the Allied workers would not have to pay initiation fees.

Rusen testified that neither he nor any other official of the Steelworkers ever confirmed in writing to Goss what Goss said regarding releasing Allied's employees. It was conceded by Rusen that he would never give up a Steelworker local without knowing whether the jobs of the members or

[ALJ 32]

seniority and benefits had been protected to his satisfaction first. Rusen testified that he has never confirmed an agreement that he reached with the President of an International Union in writing; that he has dealt with International Union officials for 27 years; and that their handshake and integrity was never in doubt until this situation occurred.

Clay attended a meeting on December 18, 1981 with McKeand and specified representatives of Allied. McKeand stated at this meeting that Allied employees were attempting to stay OCAW. Allied representatives replied that they felt it would be a mistake, "that . . . . [allied employees] should try to accept the terms and try to not create any problems for this sale, such as trying to fight to maintain . . . [their] union status." McKeand testified that Kemp of Allied stated that the probationary period had been worked out there would be none. Also, Kemp advised, regarding accretion, that this was the only show in town and they would expect the people to cooperate. Additionally, it came out that everyone at the coke plant would have a December 29, 1981 seniority date. McKeand took exception to both the seniority and accretion state-

ments. Kemp advised that if problems continued about the local going into the Steelworkers there would be a possibility that Armco would not buy the coke plant and it could be shut down.

Clay attended a meeting at the Armco mill on December 19, 1981. Maddox advised those present that Armco would hire en masse and that Allied employees would be recalled according to their Allied seniority; that Armco intended to staff the plant with Allied people and that it would recall Allied employees unless someone gave them a reason not to be recalled "or hired, I think, is how he referred to it"; that all the Allied employees would be given a December 31, 1981 seniority date; that all of the employees would be required to attend orientation meetings; and that laid-off Allied employees would have their recall rights honored as production was increased before Armco went any place else for employees. McKeand corroborated Clay adding that Maddox stated that at the orientation meetings Steelworkers cards would be passed out to be signed. McKeand believed that at this point he stated "We're OCAW people, that would subject to our questioning, and we're OCAW as far as I'm concerned and we will stay OCAW." McKeand testified that he did not make a demand for OCAW representation at the meetings with Armco because he had been told that the employees were going to be required to sign Steelworkers cards and he didn't want to jeopardize jobs. Maddox also stated that Allied employees would have recall rights for 36 months. Allen testified that the purpose of the meeting on December 19, 1981 between OCAW and Armco was to explain to OCAW officials the terms of a settlement reached between Armco and the Steelworkers; to discuss the Memorandum of Understanding reached on December 15, 1981. The settlement was reviewed paragraph by paragraph. Allen testified that no one from OCAW indicated that he would oppose the sale on the basis of the terms of the

agreement and no demand for recognition or bargaining was made.

Goss testified that approximately 2 weeks or 10 days before the takeover the Steelworkers had a meeting with OCAW members telling them that they would have to sign the checkoff. Goss was called on this matter and he instructed McKeand and Williams to tell Armco and the Steelworkers that if they didn't stop that stuff right away he was going to file an Article XX. Goss then testified that he was told it was stopped immediately. McKeand testified that on an unspecified date before December 31, 1961 he received a phone call

[ALJ 33]

from McKnight, president of Local 3-523, about being required to sign Steelworkers cards. McKeand spoke to Goss who told him to contact Thompson, a staff representative of the Steelworkers and "inform him to get off that and if he didn't, he was going to file a charge against the Steelworkers." McKeand called Thompson. This was the second time he called Thompson on that date. During the first call McKeand had asked Thompson why the Steelworkers were doing this in view of the fact that the plant had not even been sold yet. At that time Thompson responded that this was standard procedure for new employees; that they conducted their orientation at the same time as the Company; and that if someone refused to sign the card he was going to call the steel mill and tell them to fire them. In the second call, McKeand gave Thompson Goss' message. Thompson replied that the matter should be handled by someone in the higher echelons of both unions.

Allen was present at a meeting on December 23, 1981 between Allied officials and Allied employees regarding how pension would apply once they become Armco employees. While a number of questions were asked about the pension rights of Allied employees and how they would

be affected by the Armco purchase, Allen testified that OCAW did not challenge the sale or indicate that it would take any action against the sale or demand recognition.

Goss testified that on December 28 or 29, 1981 he told McKeand to tell OCAW members at the coke plant that if they were required that they should sign Steelworkers cards.

The following are pertinent portions of Armco's minutes, Charging Party Bank's Exhibit 17, of a meeting it held with the Steelworkers on the morning of December 28, 1981:

Memorandum
Meeting of the Negotiating Committee—No. 9
Office Unit No. 1, Monday, December 28, 1981, 10:30 a.m.

Present:	<u>Company</u>	Michael Hewlett
	R.T. Allen	Charles Pelfrey
	P.M. Bustin	Donald Stambaugh
	C.M. Shields	Donald R. Stamper
		Earl Tackett
		P.E. Thompson, International

Mr. Allen stated [sic] by saying that the discussions as to the purchase of the coke facility had not been finalized yet; however, a new target date had been established as 3 p.m. on 12-29-81. He went on to say that if everything went okay in these talks, the signing would take place as of 3 p.m. on 12-29-81 and from then the local parties would be in charge.

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Mr. Allen stated that he would like to discuss the situation of the Clerical employees, the Research employees, and Plant chemist. He explained that he had in his hand a very rough chart and no copies for the

Negotiating Committee at present; however, from this rough

[ALJ 34]

chart, he could show the Negotiating Committee that all present jobs would remain in the Coke Department as a self-contained department with lines of progression and several seniority units.

* * * * *

Mr. Allen stated that he would like to explain the Company's proposed manning plan as it stands at this time. He explained that the Company is essentially faced with starting from scratch. He went on to say that at the time of acquisition there would be no applications filled out by employees and in order to become an Armco employee, an Allied employee would just report for a scheduled turn and essentially become an Armco employee by reporting to work.

* * * * *

Mr. Allen concluded by saying that essentially the Company has been working with a concept that the Allied employees do not want jobs at the West Works nor do employees at the West Works want to go up there. Mr. Allen continued by saying that one group will not be displacing the other; however there is a good argument for placing some of these jobs in our seniority units at the West Works; however, with respect to this rough chart, that is not the case.

That afternoon the same members of the negotiating committee met, Charging Party Bank's Exhibit 16, and discussed, among other things, various employee positions,

the credit union at the coke plant,[15] pensions and insurance benefits.

The Armco/Steelworkers negotiating committee met on December 29, 1981 and discussed a number of topics. Charging Party Bank's Exhibit Allen was asked if the shops were or were not going to service the coke department. Allen replied that the shops would to the extent that the coke department could not take care of its own needs.

Allen testified that on December 29, 30 and 31, 1981 he attended meetings with individual crews of employees at the coke facility. Approximately 20 or so employees attended each meeting. The purpose of the meetings was to explain to employees Armco's seniority system and what could be expected under the system after the date of acquisition. Allen testified that the employees were advised that this was part of the agreement with the Steelworkers, and that none of the employees at these briefing sessions indicated that they would refuse to work under that system. McKnight, president of the Local OCAW, was present at one of the briefing sessions and he did not indicate any objection to the sale.

[ALJ 35]

McKnight testified that on December 30, 1981 McKeand told him that Goss said that once former Allied employees went on Armco's payroll and were asked to sign Steelworkers cards they should go ahead and sign them. McKnight informed the members of these instructions.

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[15] The following portion of the minutes relates to the credit union:

Mr. Hewlett asked about the credit union. Mr. Allen replied he was not sure. He added they have a federal credit union whereas Armco has a state credit unit. He added that he understood there was no provision for a merger and that they could liquidate or continue to exist as far as he was concerned. Mr. Allen pointed out that the Company is not involved except it allows a trailer on company property.

The purchase agreement, Charging Party Bank's Exhibit 6, was signed December 31, 1981. The parties made the following stipulations: effective December 31, 1981, Armco purchased the coke facility from Allied including equipment, supplies and materials located at the facility; since December 31, 1981 Armco has operated the coke facility previously owned and operated by Allied producing coke and utilizing essentially the same plant machinery, equipment and methods of production previously utilized by Allied and since December 31, 1981 virtually all of the coke produced at the coke facility has been utilized by Armco in the production of steel at its Ashland Works.

Maddox testified that on December 31, 1981 there were about 130 to 140 people working at the coke plant; that before that date Armco decided to recall laid-off Allied employees as its sole source of new hires for the coke production in the immediate future; that because of the nature of the work of producing coke in the ovens, a constant work force had to be maintained; that former Allied employees worked the same jobs largely because they were in a scheduled week when Armco took over and Armco did not try to change things around in the middle of the schedule week; and that coke is manufactured at the facility 24 hours a day 7 days a week every day of the year.

It was stipulated that since January 2, 1982 Armco has applied to hourly rated employees assigned to the coke facility the terms and conditions of the agreement between Armco and the Steelworkers; that all of the hourly rate employees hired up to the hearing herein by Armco for assignment to the coke facility formerly were members of the bargaining unit represented by OCAW during Allied's ownership; and that a substantial majority of the supervisors assigned by Armco to the coke facility previously were employed by Allied as supervisors at the coke facility.

Maddox testified that beginning January 2, 1982 Armco went through essentially the new employee hiring procedure (orientation meetings) with former Allied employees. Maddox opened the sessions and after January 3, 1982 Herb Salyer, Armco's Supervisor of Employment, spoke for Armco.[16] Officers of the Steelworkers Local were present, including Hewlett. Forms and documents were passed out by Lester, Eckert and Blair to the employees for them to sign, including a Steelworkers' dues checkoff card. Maddox testified:

> it had been a matter of discussion about whether these people, you know, were free and released and there had been some discussion on their part, obviously, about whether they should sign such cards or not. And we simply said—my instructions to our people were simply that we'd proceed with our usual hiring procedures and our usual hiring procedure is to request that they sign them.

[ALJ 36]

Maddox testified that the employees had the option as to whether or not they would sign, and assertedly they could have refused to sign and continued to work for Armco. It was conceded by Maddox that he gave an affidavit to the Board to the effect that the coke plant employees had to sign the Steelworkers cards. Each hourly employee who went to work for Armco beginning January 2, 1982 did sign the Steelworkers card.

Lester testified that she attended all of the involved January 1982 orientation sessions; that the Steelworkers membership/dues checkoff card was already partially typed

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[16] Others present for Armco included Gene Moore, Susan Lester, Larry Riel, Pam Blair, Greg Queen, Charles Napier, Clinton Shields, Mike Bustin, Elzie Thomas and Alice Eckert. It was stipulated that Salyer and Napier are supervisors of Armco within the meaning of Section 2(11) of the Act; and that Napier has since retired.

by Armco when it was handed out to former Allied employees at the orientation sessions; that with respect to Respondent Company's Exhibit 5, the membership/dues checkoff card, "it would be a standard procedure that we would explain that this was what we probably would call a union card. I don't know that we would say a checkoff authorization; and that we wanted them to look it over and see if they had any questions on it"; that regarding the membership side of the Respondent Company's Exhibit 5, before the orientation sessions Armco would have typed in the name of the employee, the ledger number, which would have been the badge or check number; that when the membership/dues checkoff card was passed around "we would have their names typed in and we would have them in alphabetical order"; and that since the employee's name was only on the membership application side of the card, the cards were handed out with the membership application side up and, therefore, the first thing the employees would have seen was the membership application side.

While McKnight was scheduled to attend the January 9 orientation session, he called Moore of Armco the night of January 4, and told him that he thought some OCAW official should be there and he was going to take the next day off and Local 3-523 would pay his wages.[17] McKnight believed that there would be some questions on whether former Allied employees should sign Steelworkers' checkoff cards. He testified that he did not overhear any questions about signing the authorization cards at the January 5, 1982 orientation session.[18]

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[17] Allen testified that since McKnight was there it was decided that he should go through the orientation at that time; and that while normally Armco does not pay prospective employees for the time they spend in orientation before becoming employees, McKnight was paid for 5 hours that day while attending the orientation along with all other employees who were already Armco employees.

[18] McKnight did testify, without indicating exactly when it was said

Gilbert, who as indicated *supra* is a former Allied employee, testified that he attended the January 9, 1982 orientation meeting; that officials from Armco attended along with 176 people from the coke plant and representatives from the Steelworkers; that no representative of OCAW in an official capacity attended; that Armco was represented by Salyer and Napier; that others from Armco passed out literature and the documents to be signed; that employees present signed a dues checkoff card; that someone in the crowd asked "what if we don't sign it and we was told that if we didn't sign it, we didn't work"; that he didn't know whether this answer was given

[ALJ 37]

by a company representative or a union representative; that the Steelworkers were represented by Mason and Hewlett; that somebody said "what if we don't sign it" and they said "if you don't sign it, you don't work"; that to the best of his knowledge Hewlett gave this answer and no Armco official in attended expanded on it; that he did not know whether the Armco representatives left the meeting once they turned it over to the Steelworkers; that he gave an affidavit to the Board relating to conversations and statements by Hewlett and did not tell the Board agent about the above-described alleged Hewlett response when the affidavit was given on June 29, 1982; that the Steelworkers' contract was passed out and that he was aware that under the terms of the contract he would have to become a member of the Steelworkers pursuant to the union security clause of that agreement[19] and consequently

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and by whom it was said, that "We was told that was a condition of employment. We would join the Steelworkers if we worked," and that former Allied employees were dissatisfied with the fact that they had to sign authorization cards but they "was told they had no choice if they worked for Armco."

[19] Allen testified that under the agreement between Armco and the Steelworkers if an employee hired after 1955 did not pay dues to the

he would have to pay dues; and that he did not want to be a member of the Steelworkers as a condition of employment.

James Pierce, who was an employee at the coke plant testified that on January 9, 1982 he attended an orientation meeting; that he was a member of OCAW and he did not want to become a Steelworker; that when he got to the union checkoff card he said to a lady who had passed them out and was helping fill them out "I don't wish to be a Steelworker do I have to fill out this card? Is it necessary for me to?"; that the lady spoke to Salyer and then told Pierce "Yes you do it's a condition of employment. If you don't sign the card you can't work. Why wouldn't you want to sign it?"; that he advised the lady that he thought he already belonged to a union; that he also heard someone else in the room ask "do I have to sign this card?" and Salyer said "You don't have to work at Armco but if you don't sign the card—if you work at Armco, you'd have to sign the card"; and that he heard someone at the orientation meeting explaining that there was a union security agreement in the contract and at some point all employees would have to join the Steelworkers Union.

Lester testified that no one asked her whether or not they were required to sign the dues authorization card and that she did not recall anyone asking Mr. Salyer this question; that no one stood up in the room and asked that question; and that she was never asked to obtain direction from Salyer as to whether or not an employee had to sign. Salyer testified that on January 9, 1982 or January 15 one of his staff members indicated to him that someone had asked him while he was passing amongst the former Allied employees at the orientation session "do we have to sign" and he said "We would like for you to"; that he

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Steelworkers after a 30-day period, Armco would be forced to terminate the employee.

had no recollection whatsoever about some lady who was present at these orientation sessions was asked the question whether the employees were required to sign and went to Salyer for direction and came back and told the employees that they were required to sign as a condition of employment; that neither Lester nor Eckert came to him during the orientation session and asked him about whether the employees were required to sign authorization cards; that he did not instruct anyone to tell employees that they were required to sign; that he did not know Jim Pierce; and that he recalled Stanley Leak being present at the January 9 orientation session.

[ALJ 38]

Leak testified on rebuttal that he knew Salyer for about 25 years; that on January 9, 1982 during an orientation session a question "was asked about signing the cards, check off cards for the Steel Workers /sic/ . . . if we didn't sign them what would happen [and] [t]hey said if you don't sign you won't work"; that Salyer gave the response; that he did not know who asked the question in the crowd of about 100 or better; that Salyer said if you want to work at Armco you do since that was their policy; that the person asked "do we have to sign this check off card and they said if you don't sign it you don't work"; that the questioner asked: "do we have to sign this card"; that the question was raised when the cards were passed around; that he had signed three or four papers already before that; that he did not believe that Salyer explained that there was a union contract provision under which the employees would have to become members of the Steelworkers; and that he did not remember Salyer saying at any point during the orientation session that after 30 days or 520-hours or at some point you are going to have to become members of the Steelworkers as a condition of employment.

Subsequently, Salyer testified that he was present during the entire employment session presentation at the January 9, 1982 meeting and he recalled no question being asked of him concerning signing dues authorization checkoff cards, and he did not recall making any statement concerning that issue; and that he had no recollection of anybody raising the subject.

Goss testified that it took him until January 18, 1982 to even get a copy of the takeover agreement; McKeand dictated to Goss' secretary his understanding of the document around the 18th or 20th, "We did not have the document."

The parties stipulated that on January 28, 1982 Gail Riggs, a former Allied employee who later became an employee at the Armco coke facility, called OCAW president Goss at his home at about 10 p.m. and asked what the situation was with the Local, where they OCAW members or had OCAW abandoned them. Goss testified that during January 1982 he had conversations with members of Local 3-523 and recalled a conversation with Riggs in late January; that Riggs made some heated remarks and Goss ended up after trying to explain his position hanging up on Riggs; and that at no time did he tell Riggs that he, Goss, had released the members of Local 3-523 to the Steelworkers.

On February 2, 1982 McKeand conducted an election at OCAW Local 3-523 excluding from participation those members of the Local who had formerly been employed by Allied; only members who worked for the Ohio River Company (Kenova Terminal) participated.[20] Clay testified

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[20] The minutes of the meeting were received as Respondent Company's Exhibit 19. They show that McKnight attended since they indicate he explained the purpose of the meeting. It appears that Clay also attended since his name is listed (albeit without specific designation) at the beginning of the minutes along with the names of McKeand, McKnight and Rakes.

that he and other former Allied employees were not even notified of the election and the fact that they were not allowed to vote or run for office became a matter of controversy. Subsequently, Goss set the election aside.

Armco began recalling laid-off Allied employees, including Clay, in March 1982. Clay testified that he along with between 70 and 80 former Allied employees, was recalled or hired by Armco when they restarted battery four; that he attended an orientation meeting at which comments were made about the

[ALJ 39]

Steelworkers checkoff card "about whether they had to sign it or whether they didn't or what, and did—they—we were told you sign it or you won't work,—or we won't hire you"; that this orientation meeting was held sometime in the middle of March 1982, and the employees were told, with respect to the dues authorization card "We would have to fill it out"; that Armco spokesman Salyer stated that "[i]t was either sign it or not be hired"; that maybe Salyer did not specifically say "[i]t was either sign it or not be hired"; and that in his affidavit to the Board dated May 12, 1982, he stated that the Armco representative did not say what would happen if we did not sign the checkoff form.

Salyer testified that when former Allied employees received the dues authorization cards they were not told that they were required to sign those, and they were not told that they couldn't get a job if they didn't sign the card.

Clay identified and testified regarding Charging Party Bank's Exhibit 5, which is a letter to the Steelworkers Local Union 1865 from OCAW Local 3-523, that the OCAW Local indicated in the letter that it was writing to clarify its position. It cites the successorship clause in OCAW's contract with Allied and goes on to discuss the accretion assertion made by Armco pointing out, among other things,

that the occupational hazards at the coke plant are significantly different than those at the mill. OCAW goes on to express its concern about rumors that Steelworkers have been filing grievances claiming they have the right to bid on jobs at the coke plant. Also, OCAW points out that it was never notified of the negotiations between Armco and Steelworkers in December 1981 regarding the terms and conditions of employment of the former Allied coke plant employees whom Armco intended to employ; that under the agreement finally negotiated, former Allied employees lost pensions, vacations, wages and other benefits of great value to them; and that under the negotiated agreement Allied coke plant employees would all have a seniority date of December 31, 1981, the date they are officially hired by Armco. Clay testified that while the draft letter was dated March 12, 1982 the actual letter was sent within a week to 10 days later. The acting committee which was made up of the officers of Local 3-523 sent the letter. Clay did not believe there was a response to it.

Goss sent the following letter, Respondent Union's Exhibit 3, dated March 18, 1982 to all members of OCAW Local 3-523:

> Greetings:
>
> As you all are aware Armco Steel Company purchased the Allied Chemical Company, Ashland, Kentucky, where you and many other OCAW members were employed effective January 1, 1982. Under the law, situations of this kind are very difficult to handle. An employer purchasing a plant from another employer does not have to recognize the bargaining contract which existed between the Union and the seller. If the purchaser hires a majority of the employees who were members of the Union, such purchaser might have to negotiate with the Union that represented the employees prior to the sale. This is not true in every situation because if the plant is pur-

chased and becomes a part of the overall purchaser's operations, that purchaser may have to negotiate with the Union that represents his employees.

[ALJ 40]

The International Union has every reason to believe that had the Oil, Chemical and Atomic Workers International Union raised a question of representation rights prior to your being hired by Armco then Allied Chemical Corporation would have closed the plant down and laid everyone off thus freeing Armco to hire new employees rather than members of OCAW.

The first problem that had to be solved, therefore, was to make certain that each of you were given job opportunity and recall rights—this was accomplished for you and your families. For these reasons, OCAW has not, up until now, raised the question of who should represent the employees by taking appropriate action before the NLRB. OCAW did not wish to encourage Armco to hire employees off the street rather than keep our members working.

I have recently received a telegram from certain members of OCAW Local 3-523, protesting the fact that OCAW has not taken any steps to obtain bargaining rights with Armco for our former members. I do not intend to represent the membership of this Union based on the demands of self-appointed committees, therefore, I am calling a meeting of all of the members of Local 3-523 that formerly worked for Allied Chemical for the purpose of determining what the desires of the total membership is regarding these important questions.

If the International Union now takes steps to obtain bargaining rights, we should do so only after giving due consideration to the overall economic situation and the possible impact on your job with Armco. As

> you can see, extremely important decisions will be made by the membership which will indicate to the International Union what course the International should follow regarding your situation at this meeting and I strongly urge you to attend the meeting so that you can vote on these very important decisions that will affect you.
>
> Please make plans to attend this important meeting at 2:00 p.m. on Sunday, March 28, 1982, at 4008 Jefferson Street, Ashland, KY 41101.

Between 250 and 350 OCAW members attended the meeting held on March 28, 1982. Also present were John Tadlock, who is the General Counsel of OCAW, McKeand, Williams and attorney Bank, who was retained by local members. There was a voice vote taken which was unanimous to assert OCAW jurisdiction at the coke plant. Bank testified that the membership wanted to elect their own officers which McKeand originally ruled to be out of order. Because of the pressure, however, the members were allowed to elect their officers subject to Goss' approval. It was Bank's understanding that the Local could then proceed subject to Goss' approval and not wait for it. Bank went on to testify that about this time local members informed him of rumors that steel mill employees would be coming to take jobs at the coke plant.[21] Consequently about one week

[21] Bank testified that there were two sources of fear among the former Allied employees the first being the fact that some Armco employees started doing maintenance work at the Allied plant and former Allied employees believed the trend could increase; that the second source of fear was that the Armco steel plant had a fairly large layoff creating a pool of unemployed Steelworkers; that grievances were filed by the unemployed Steelworkers requesting the right to bump coke plant employees; and that because every Steelworker in that unemployed pool had greater seniority than every single coke plant employee the fear was that the coke plant employees would be inundated.

[ALJ 41]

later they sent a letter demanding bargaining rights from Armco as the temporary officers, as more fully described below.

Rusen testified that in late March he had seen the above-described four-page letter to Hewlett signed by 38 coke plant employees indicating that they were unhappy with the Steelworkers' representation. Rusen spoke with the Director of District 3 of OCAW, Williams, in April 1982 but the discussion terminated very quickly, according to Rusen, in a shouting match. Rusen asked Williams what could be done to get the problem straightened out at the coke ovens and Williams replied "[w]'re too far down the road." Rusen believed this was after the charges had been filed.

OCAW Local No. 3-523 sent the following letter to Armco on April 5, 1982:

> On behalf of Local Union 3-523 of the Oil, Chemical and Atomic Workers Union, we demand that Armco meet to negotiate terms and conditions of employment covering all bargaining unit employees at Armco's Ashland coke plant.
>
> As you know, most bargaining unit employees at the coke plant have been continuously represented through recognition and certification by Local 3-523 since 1955. In 1966, Local 3-523 was certified as the bargaining representative for the remainder.
>
> At the time Armco purchased the coke plant, it was apparent that the work force would by and large be made up of former Allied employees represented

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Members of Local 3-523 have been paying a voluntary assessment of $5 per person, per week to pay for Bank's services, which General Counsel points out on brief is an indication of how strong the desire of the coke plant employees is to be represented by OCAW.

by Local 3-523. It was also clear that the coke plant should be considered an independent bargaining unit. Nevertheless, Armco forced former Allied employees to sign cards making them members of Local 1865 of the United Steelworkers of America as a condition of employment.

As of today, a majority of the bargaining unit employees who formerly worked for Allied are working at the coke plant. In addition, all bargaining unit employees working at the coke plant now are former Allied bargaining unit members represented by Local 3-523 of the OCAW.

Apparently, Armco took the position that it could require employees to sign Steelworker's cards because the coke plant was an accretion to the Ashland Steel Works whose bargaining unit employees are represented by Local Union 1865. We think Armco's claims of "accretion" are totally without merit. There are major differences in working conditions of coke plant and steel works employees. The two locations are physically separate, their products are different, and each has a long and separate bargaining history. We have no information indicating that Local Union 1865 ever demanded jurisdiction over us. We can only conclude that it is for reasons of business convenience that Armco wishes the two bargaining units to be merged.

[ALJ 42]

All these factors leads inescapably to the conclusion that there is no community of interest between Coke Plant and steel works employees which would justify an accretion. Furthermore, under the law, there is presumption in favor of single plant bargaining units, especially where, as in the case of the Coke Plant, the existing bargaining representative has been either certified or recognized for approximately thirty years.

The law does not allow Armco, under the banner of business representative ought to be. Any interest which Armco has in seeing the two bargaining units merged, or to have the Steelworkers represent us, is irrelevant or clearly outweight [sic] by our statutory right as employees to choose our own representative.

Armco's actions to date have already caused us grave damage. Armco changed the terms and conditions of employment governing the Coke Plant without bargaining with Local 3-523, our legal bargaining agreement which Armco [sic] under the collective bargaining agreement which Armco did negotiate with Local 1865 former Allied employees at the coke plant have lost seniority, rights to recall, pension and vacation benefits, and wages. The losses in seniority and recall which we have suffered have openly and intentionally benefited employees at the Steel Works whom Local 1865 has traditionally represented.

At an Armco indoctrination meeting for coke plant employees held on March 16, 1982, Armco official, Dick Allen, stated that Armco had been willing to give holdover Allied coke plant employees credit for their Allied seniority. He . . . [stated] further that it was Local 1865 which insisted on the December 31, 1981, seniority date ultimately negotiated for holdover Allied coke plant employees. If Mr. Allen's statements are true, we need no further proof of the necessity of our right to self-representation.

We hope you will respond positively to our demand to negotiate and our representatives stand ready to meet with your representatives immediately.

Temporary Committee of Local 3-523.

The letter was signed by six individuals.[22] Clay testified that before Local 3-523 sent its demand for negotiation

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[22] Clay, R.C. Arnett, Paul Osborne, Vic Hopper Jr., Gail Riggs, and Charles McGraw. Respondent Union's Exhibit 2.

to Armco, the Local did not discuss the letter with representatives of OCAW International or with McKeand nor was a copy of the letter sent to the International. Clay conceded that Goss' letter of April 5, described below, stated that no one was authorized to act on behalf of Local 3-523 and, therefore, the letter sent to Armco on April 5 was not done with authorization of OCAW.

[ALJ 43]

Goss sent the following letter, Charging Party Bank's Exhibit 3 dated April 5, 1982, to all members of OCAW Local 3-523:

> Pursuant to the notice of March 18, 1982, a meeting of Local 3-523 was conducted at the Union Hall on March 28. I assigned International Representative McKeand, Director John Williams and General Counsel John Tadlock to attend this meeting on my behalf. This meeting was well attended and the situation of the former employees of Allied Chemical Company was fully explained.
>
> It was pointed out that the reason that the International Union did not take steps to obtain bargaining rights from Armco after Armco purchased the Allied plant was because the International did not want to jeopardize your job opportunities with the Armco Steel Company. As a result Armco Steel recognized the Steelworkers for the employees working in the former bargaining unit that Allied had operated. It was also explained that if the International Union proceeded to ask for bargaining rights at this time that it could impact upon your jobs with Armco.
>
> After this was fully explained to those in attendance at this meeting, they voted unanimously to ask the International to try to seek bargaining rights even if it did impact upon your jobs. When I got the report from Director Williams and General Counsel Tadlock,

I proposed that the former officers of the Local Union turn over the money and records to International Representative Jake McKeand who would divide the money on a pro rata basis between the former Allied employee-members and the present Ohio River Terminal Company employee-members. This would give the remaining members of Local 3523 who worked for Ohio River Terminal Company sufficient funds to carry on negotiations and arbitrations and otherwise fulfill their duties as bargaining representative of those members. I further proposed that the remaining moneys be sent to the International Union for the purpose of defraying the cost involved in seeking to obtain bargaining rights for OCAW with your present employer, Armco Steel.

Any moneys remaining after that procedure was followed would be returned to the Local Union. The means by which I proposed to seek bargaining rights for OCAW with Armco was by filing a National Labor Relations Board charge. In such proceeding the National Labor Relations Board would have to determine whether or not the bargaining unit formerly comprised of the Allied employees was an accretion or addition to the bargaining unit that the Steelworkers have with Armco at the steel mill in Ashland.

The above procedure was outlined as a voluntary method of solving your problems and I had hoped that all of the membership would agree to follow such procedure. However, my present information is that certain members have strong objections to proceeding in this manner largely because the International would not authorize the use of an attorney who has been retained by some individuals on a personal basis. Whatever the reason might be for objecting to this voluntary procedure, I have now determined that I must take positive steps in the exercise of my authorities in the

[ALJ 44]

International Constitution to assist the membership as best I can. The term of office of the former officers of Local 3-523 expired on March 9, 1982 and the Local Union did not elect anyone to fill the offices. As a consequence there is no one legally able to fulfill the duties of these offices. The activities of the Local cannot be legally carried on by persons from that group who have not been elected pursuant to the Local or International Constitution and Bylaws. I, as President of the International cannot allow this situation to continue.

I am, therefore, placing the Local Union under administratorship and appointing International Representative Jake McKeand to be the administrator. He will conduct the affairs of the Local, take charge of the books and records and proceed to carry out the plan outlined above as a legally appointed official. At the appropriate time, Representative McKeand will conduct an election adhering to all the legal requirements and in accordance with the Local Constitution and Bylaws. Persons elected at that time will assume office and carry out the function of Local 3-523.

I hope that our efforts on your behalf are successful and that OCAW can again represent you as employees of Armco Steel.[23]

In a letter dated April 12, 1982, Charging Party Bank's Exhibit 4, to the individuals named in note 22 supra, Maddox stated:

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[23] In a telegram, Exhibit B to Respondent Union's Exhibit 1, dated April 5, 1982 to Rakes, Clay and McKnight, Goss took the same position as declared in his April 5 letter. The telegram contains the following language:

YOU ARE HEREBY DIRECTED, INSTRUCTED AND ORDERED TO CEASE FORTHWITH FROM ENGAGING IN ANY AND ALL ACTIVITIES AS AN OFFICER OR AGENT OF LOCAL 3-523.

In your letter of April 5, you state that Armco acted illegally in treating the former Allied coke plant as an accretion to the Ashland Works and you request that we meet and negotiate with representatives of your Committee. However, the Coke Department employees are now a part of the United Steelworkers bargaining unit at the Ashland Works and the United Steelworkers and its Local 1865 are the exclusive bargaining agents for the Coke Department hourly employees.

Accordingly, we cannot agree to negotiate with your Committee or its representatives.

A complaint was filed on April 13, 1982 by OCAW International and McKeand against Rakes and Clay *et al.*[24] in the United States District Court for the Eastern District of Kentucky at Catlettsburg, Civil Action No. 82-75. Numbered paragraph 13 of the complaint alleges that "[s]ince April 5, 1982, defendants Clay, Arnett, Osborne, Hopper, Riggs, and McGraw have refused to

[ALJ 45]

cease their activities as an unauthorized temporary committee engaged in collective bargaining. Plaintiffs requested that defendants be temporarily restrained from and permanently enjoined from, among other things, conducting collective bargaining activities in behalf of Local 3-523 unless and until such activity is authorized by Plaintiffs following proper democratic procedures as established by Plaintiffs' 1981 Constitution."

The following day, April 14, 1982, the Court issued an Order, Charging Party Bank's Exhibit 1, pertinent portions of which are as follows:

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[24] Respondent Union's Exhibit 1. More specifically, the suit was filed against these two individually and as former officers of Local 3-523 and against those named in note 22 *supra* individually and as the temporary committee of the Local.

IT IS THEREFORE ORDERED AND ADJUDGED as follows:

(1) That Plaintiff's motions for Temporary Restraining Order and for Preliminary Injunction are DENIED, except that the Court will ratify the Plaintiff's appointment of Mr. Kenneth S. McKeand as Administrator of the Defendant Local 3-523 for a limited period of time and for limited purposes as follows:

(a) The Administrator will call for an election of officers for said Local in strict conformity to the provisions of the Constitution and By-Laws of the Plaintiff International Union and Local 3-523 within three (3) weeks from and after this date. The call for and notice of an election of officers shall be conducted through the Local Trustees whose terms have not expired and, technically, are incumbent officers of Local 3-523.

* * * * *

By letter dated April 15, 1982, OCAW International demanded that Armco recognize it and bargain with it as the bargaining agent for employees at the coke plant. The parties stipulated that prior to April 15, 1982 OCAW itself made no formal demand upon Armco for recognition of the coke facility employees and authorized no recognition of the coke facility employees and authorized no recognition demand which may have been made by others.

An election was held in May 1982 and Clay was elected President of Local 3-523.[25]

Allen testified that on May 25, 1982, after OCAW had filed charges with the Board, the Steelworkers and Armco

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[25] The coke plant members of the Local were required to pay a per capita tax for back dues in order to be able to vote. Subsequently only officers were required to pay their per capita dues each month. The remainder of the membership was carried on an out-of-work status in good standing.

executed a Memorandum of Understanding which delayed the implementation of pool rights on the part of the steel mill employees; and that Armco and the Steelworkers had that understanding before that time but it was not that specific.

Charging Party Bank had Maddox identify a step 3 grievance decision he wrote, dated August 18, 1982, Charging Party Bank's Exhibit 1, in which Maddox stated that the grievance alleges that Armco is not acting in good faith as to the installation of incentive standards at the earliest practical date; that the coke department "is an entirely new operation at the Ashland Works and it

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is unlike any existing facilities or operations at the plant"; that work was in progress regarding job descriptions, evaluations, manning requirements and in general familiarization with the coke department; and that the grievance is denied. Maddox testified in the hearing herein that incentives had been installed in the coke department.

Rusen sponsored a letter, Respondent Union's Exhibit 10, which is dated November 1, 1982 from Gary Massey, President of Local Union 1865 to Clay inviting him to attend a meeting to discuss problems at the coke plant in Pittsburgh, Pennsylvania on November 8, 1982. The letter indicates that Local 1865 would not be responsible for any travel or hotel expenses nor will they be responsible for any lost wages. etc. Rusen also sponsored a letter Respondent Union's Exhibit 9, from Clay to Massey which indicates that Clay received the above-described letter from Massey on November 4 and that he could not attend the meeting because sufficient notice had not been given. Clay went on to list eight subjects of concern at the coke plant. And he requested an opportunity to discuss these matters with Massey before Massey left for the meeting in Pittsburgh. Rusen testified, regarding Respondent Union's Exhibit 10, that there never was a meeting in Pittsburgh on

November 8; that in the normal course of events when people go on union business they are paid their expenses, their traveling expenses; and that in the normal course of events they would be paid lost wages also.

The parties stipulated that as of July 1983 Armco has contracted to sell 13,000 to 15,000 tons of coke a month to Sharon Stell for a period of 6 months; and that by-products of coke continue to be sold to substantially the same customers as were serviced by Allied.

At the hearing herein Maddox testified that since January 2, 1982 none of the coke plant employees has been assigned to work at the steel mill and as of August 10, 1983 there were between 340 and 350 employees at the coke facility and about 500 people still on layoff at the steel works.

Regarding the involved coke facility, Maddox testified that its main entrance is 4.5 to 5 miles from the main entrance of the steel mill works; that coke department employees punch a timeclock which is located in the coke plant; that the coke plant employees have their own independent Federally-chartered credit union with offices at the coke plant and the steel mill workers have a State-chartered credit union at the steel works; that Armco deducts from the pay of the coke plant employees monies which go into the Federally-chartered credit union at the coke plant; that the telephone number that Allied used prior to the Armco takeover is still the telephone number of the coke plant and the coke plant has its own main line; and that Washburn was the manager of the coke plant, which Maddox described as a free standing plant under Allied, and since Armco acquired it Washburn has been employed by Armco as superintendent of operations at the coke department.[26]

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[26] Maddox testified that Washburn, under Armco, is charged with the same type of responsibilities that any major operating department head

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When Allied operated the involved plant it had an ambulance and a nurse at the plant's first-aid facility. Under Armco if a coke department employee has a minor injury on the job, or even a headache, either the foreman or the medical technician sends the employee by taxicab to the West Works for medical treatment. If it is serious, an ambulance is called and the employee is sent to a hospital in Ashland.

Homer Moore, a Steelworker shop steward and Chairman of the Union Safety Committee, testified that coke department employees complained to him about the problem of toxics being dumped in what is called the bug pond: that he met with Armco officials who admitted there was over-exposure to hydrogen sulphide gas, which can be lethal; that Armco set up a procedure, namely, monitors and wind direction bags; that within a few days he again received complaints from the employees; that perimeter signs were posted and new monitors were ordered because those on hand were set to go off at 25 parts per million while the Kentucky ceiling was 20 parts per million; that he discussed the procedures with a representative of the Kentucky Occupational Safety and Health Administration and it was concluded that they were sufficient; and that while he did not file a complaint with the United States Occupational, Safety and Health Administration (OSHA) over this matter he heard that OCAW did.

Moore did file a complaint with OSHA when Armco, allegedly in violation of OSHA's coke oven standards, refused to give coke facility employees a choice between a normal respirator or an air-power supplied respirator. And he filed a complaint with the appropriate Kentucky agency

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would have in the plant; that Washburn does not have supervisory responsibility over the maintenance function in his department; and that grievances of maintenance people in the coke department are handled by supervisors of maintenance and then go to Maddox's level.

when Armco discontinued the coke facility's on-site ambulance. The state did not find a violation with respect to the latter.

Regarding the work force at the coke facility, Maddox testified that Armco assigns people from crafts and other classifications on a permanent, regular basis at the coke plant, in a way that it does not in other areas of the steel mill because of OSHA regulations and the problems that would follow if people had to come in and out and change clothes all the time; that the coke plant has crafts assigned there which are different than others; that the classifications for coke plant employees were proposed by Armco and may still, at the time of the hearing herein, be in the process of negotiations; that prior to the takeover Armco and its Ashland Works did not have a classification for a heater of the type utilized at the coke plant nor a classification for an operator pusher machine, operator-door machine, nor for the functions performed by a lorry car operator at the coke plant, nor a quencher; that while Armco has oven utility men at the West Works they were not performing the same function as the oven utility man at the coke plant; that the same would be true of a lid man and a bench man; that Armco does not have at its mill any sulfiban operators or byproducts or operators or AC operators who operate the ammonia plant or AC helpers or loaders of coke byproducts, a minister stine operator; that jobs throughout the steel plant are very different and they are all classified under the same system, which is an agreed classification system throughout the steel industry, and jobs in the coke plant are generally classified under that industry system; that under the Steelworkers agreement Armco has come up with its own system for classification; that maintenance employees who were assigned to the coke plant

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do not do maintenance work in any other department; and

that the coke plant has some of the less desirable jobs and older employees opt out at the first chance they get into what they consider to be preferred departments like the cold mill, the hot mill or the transportation sections.

Harold Roblin, Armco's Manager of Maintenance and Service testified that in the 18 months Armco has had the coke department it has used its central shop maintenance personnel a total of 75,000 man hours in the coke department; or, in other words, an average of about 24 men a day; that of the 650 assigned maintenance employees about 100 are assigned to the coke department; and that, as stipulated, all of the 100 are former Allied employees.

Washburn testified that shortly after the takeover of the Allied plant by Armco the employees represented by OCAW were performing essentially the same work under Armco as they had been performing under Allied with some of them "in slightly different capacity than they had prior, due to their rearrangement of things."

Clay testified that he has observed employees from the steel mill perform maintenance work at the coke facility i.e. painting and stencilling which Clay testified formerly were done by employees in Allied's paint classification.

Pierce testified that he worked in maintenance as a door repairman for Allied and that he had the same job with Armco since it took over the coke plant.

Regarding preventative measures Armco would be forced to take if the coke facility employees were represented by OCAW, Maddox testified that if the coke plant contract was about to expire, Armco would stock a 3-month supply of coke in anticipation of a possible strike; that he would want at least 42 days worth of coke on the ground when the contract terminated; that there was an 84-day strike at the coke plant in 1979; that coke is a vital ingredient and that the people who have control over it have considerable leverage over the rest of the employees in the

plant, and they might exercise that leverage for their own specific interests; that there would be quite a difference in peer pressure in striking a plant of 4,500 instead of a plant of 400; that the last Steelworkers strike at Armco's Ashland facility was 1959 and since the Steelworkers strike at Armco's Ashland facility was 1959 and since the Steelworkers began representing employees at Armco's mill in 1942 there had been three contract strikes including the 2959 strike; that there have been a great many contract strikes at the coke plant over the years, and that this was of concern to Armco; that if the coke plant employees were members of the Steelworkers and there was a wildcat strike the whole works would be shut down; and that, on the other hand, if the coke plant employees were a separate unit and there was a strike, only the coke plant would be shut down.

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Goss testified that "if Armco wants to determine whether we represent the majority of them, [coke facility employees] we'll go to an election . . . [o]r I'd be willing to demonstrate . . . [it] by calling a strike and see if a strike occurs.[27]

Billy Joe Snyder, Superintendent of blast furnaces at Armco's Ashland Works, testified that a one or two day supply of coke was maintained in the railroad cars at the time of the hearing; that if the supply of coke was cut

[27] Rusen testified that he would not agree to such an election. Regarding whether the coke facility employees wanted to be represented by the Steelworkers, Bank testified that coke facility employees are totally dissatisfied with the Steelworkers representation; that they don't like the structure of the Steelworkers; that they don't like three level bargaining; that they've always been able to handle their own bargaining on a local level; that they've always controlled their own destiny; that they feel that they have problems which are unique to the coke plant that they know very well having handled their own affairs for 30 years; and that basically it's the question of the ability to control their own fate.

off and Armco was unable to obtain coke then it would have to bank the blast furnaces; that a blast furnace can be banked only for so long before the metal at the bottom starts to solidify; that an alternative would be to purchase coke on the open market; that variations in the quality of coke effects the efficiency of the blast furnace; that the quality of the coke that is available on the open market is not what is needed for the large blast furnaces and this results in Armco using more coke to stabilize its operation in the furnace; that the type of coke utilized by Armco could result in a sayings or as much as $30,000 to $40,000 a day in hot metal; that while the blast furnaces have been showed down because of availability of coke, he did not remember a complete shutdown because of a lack of coke, and he had been working with the furnaces since 1948; and that in 1981 Armco purchased coke on the open market and Armco operated at a profit.

With respect to the economic performance at Armco's Ashland steel facility, Maddox testified that 1981 was a record year for the steel industry and for Armco which made a total of $2.5 million at the Ashland plant; that in each of the three preceding years Armco had a profit at the Ashland plant; but that in 1982 the Ashland Works lost $64 million before taxes and in 1983, up to the time of the hearing, it lost $22.5 million.

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B. Discussion

Before reaching the merits, certain procedural matters must be handled. First, Charging Party Bank moves to strike portions of Respondent Armco's brief.[28] Specifically he moves to strike footnotes 6 through 12 and all factual references in the text of the brief dependent thereon on the grounds that the footnotes are comprised entirely of references to irrelevant reports, opinions, data, events and

[28] OCAW joins in Bank's Motion.

other material, none of which was put into evidence at the hearing.[29] Armco responds that the challenged matter is relevant and "fits comfortably within the recognized scope of . . . official notice." Respondent Armco's Reply page 8. However, under Section 556(e) of the Administrative Procedure Provisions, Title 5 of the United States Code, if an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled on timely request, to an opportunity to show the contrary. The challenged portions appear in the argument section of Armco's brief and they will be treated as just that. Consequently, Bank's Motion is denied.

Next, Respondent Armco moves to supplement the record by including therein an affidavit which is attached to its Motion. Bank opposes the motion contending that it is not allowable under the Board's Rules and Regulations; that even assuming that discretion exists to reopen the record at this point, the evidence sought to be adduced is irrelevant and immaterial in that it would not require a different result since accretion is a valid defense only if it existed at the time of sale of the coke plant; that Respondent Armco should be prohibited from introducing evidence which it generated, rather than discovered, following the closure of the record; that Armco should not be allowed to introduce post-hearing evidence which flows from its illegal imposition of the Armco-Steelworkers contract at the coke plant; that the affidavit should be precluded from evidence because it is based upon post-hearing circumstances which may be transitory; and that if the record is reopened, General Counsel and the Charging Parties are entitled to cross-examine the affiant and introduce evidence of their own on issues raised by the affidavit. OCAW opposes the Motion on the ground that it is procedurally inappropriate; that introducing the affidavit of a

[29] Bank contends that while the evidence proffered in footnote 12 refers to post-hearing developments, it should still be stricken as irrelevent and prejudicial.

witness who has previously testified denies the General Counsel and Charging Parties the opportunity to engage in cross-examination; and that the evidence Armco seeks to introduce is outside the relevant period since it occurred 2.5 years after the coke plant was acquired. In my opinion Armco's Motion should be, and it is hereby, denied.

And finally, on brief, reconsideration is requested of some of my rulings. After reviewing them and the grounds advanced for reversing them, it is my opinion that the rulings should stand.

Both Respondents assert as a defense that the underlying alleged unfair labor practices occurred beyond the 6-month period set forth in Section 10(b) of the Act. On brief, it is contended by the Steelworkers that the charge

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against it was filed by Bank on June 14, 1982 and served by the Region 1 day later; that the statute began running no later than December 5, 1981 when the decision to recognize the Steelworkers through accretion had been made and unequivocally communicated to OCAW; that, alternatively, if the triggering event occurred on December 15, 1981 the charge is untimely because it was served 1 day after the 6-month statutory period had expired; and that while the Board evidently allows 1 extra day for service purposes, the Board's position is internally inconsistent and at odds with the words of the statute. General Counsel, contends that the Section 10(b) period begins to run when the Steelworkers were, in fact, installed at the coke plant, December 31, 1981, and not when it was decided to install them; and that since OCAW filed its charges on April 20, 1982 and they were served the same day, the Section 10(b) period began to run on October 20, 1981 while the alleged violations occurred in December 1981 and thereafter. Charging party Bank, contends that Armco's refusal to bargain with OCAW could commence only after its duty

to bargain matured, i.e. after the December 31, 1981 sale; that regarding the Steelworkers, any conduct alleged to have occurred after December 14, 1981 would be within the Section 10(b) period; that until December 31, 1981 it was uncertain that the coke plant would actually be purchased by Armco; that Section 10(b) is subject to equitable tolling principles which are invoked where the charging party did not have sufficient facts available to ascertain the occurrence of a violation; that the substance of the December 15, 1981 Memorandum of Understanding was not communicated to OCAW until at least January 18, 1982; and that consequently even if the operative date for some of the violations alleged against the Steelworkers is December 15, 1981, the statute of limitations was tolled until January 18, 1982. There is no question but that the charge filed by OCAW was timely. Regarding Charging Party Bank's charge, it is noted that the complaint alleges that *on or about* December 15, 1981 Armco and the Steelworkers entered the involved Memorandum of Understanding; that the parties stipulated at the beginning of the hearing that the Memorandum of Understanding was executed on December 15, 1981; that the evidence of record indicates that the Memorandum of Understanding was only tentatively agreed to on December 15, 1981; and that Ruesen testified that at some unspecified time after December 17, 1981 he called Wallace and told him that the agreement was in place. The alleged unfair labor practices did not occur beyond the statutory 6-month period.

General Counsel and the Charging Parties contend that Armco is a successor to Allied and, therefore, Armco was obligated to recognize and bargain with OCAW as the representative of the coke facility employees. Armco's defense is that the acquisition of the involved coke plant was an accretion to its already existing operations at Ashland.

As pointed out in *N.L.R.B. v. Security-Columbian Banknote Co.,* 541 F.2d 135, 138-139 (3rd. Cir. 1976):

> the underlying policy of the successor employer doctrine . . . seeks to facilitate transfers of capital to enable reorganization and vitalization of business enterprises but at the same time protect employee rights and assure the accomplishment of the transition in an environment of industrial peace. [Citations omitted.] Changes in ownership of an enterprise may eliminate contractual obligations to employees, *N.L.R.B. v. Burns Int'l Security Services, Inc.* [406

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> U.S. 272 (1972)] . . . but a successor employer 'has frequently been required to assume the statutorily-imposed duty of the predecessor to bargain with the designated representative of its employees.' Note, The Bargaining Obligations of Successor Employers, 88 Har.L.Rev. 759,760 (1975).

In determining whether an employer is a successor the following factors are considered: (1) whether there has been a substantial continuity of the same business operations, (2) whether the new employer used the same plant, (3) whether the new employer has the same or substantially the same work force, (4) whether the same jobs exist under the same working conditions, (5) whether the employer employs the same supervisors, (6) whether the employer uses the same machinery, equipment and methods of production, and (7) whether the employer manufactures the same product or offers the same services.

The court in *N.L.R.B. v. Security-Columbian Banknote Co., supra*, at 139 went on to state:

> These factors, it is often said, should be seen from the perspective of the employee. [Citations omitted.] This 'employee viewpoint' derives from the concept that the only reason to limit a successor employer's ability to reorganize his labor relations is to offer the employees some protection from a sudden change in

> the employment relationship. [Citation omitted.] Thus, the inquiry must ascertain whether the changes in the nature of the employment relationships are sufficiently substantial to vitiate the employee's original choice of bargaining representative. [Citations omitted.]

General Counsel contends that absolutely nothing changed with respect to the seven above-described factors after Armco took over the operation of the coke plant; that the same business, the production and sale of coke, is still carried on at the same plant, with the same production work force which still has the same jobs and working conditions, the work force is supervised by the same management personnel, and the coke plant has the same machinery, equipment, and methods of production; that as in *Stewart Granite Enterprises*, 255 NLRB 569 (1981) all the predecessor's employees were hired because the jobs were not routine or unskilled, but rather they required special experience, if not expertise; that it was concluded in *Premium Foods, Inc.*, 260 NLRB 708 (1982), enforced 709 F.2d 623 (9th Cir. 1983), that the most important of all the above-described factors is that the Employer 'recruited its entire . . . work complement from the production and maintenance unit of . . . [predecessor's] facility and utilized them in each of the job classifications represented in the former . . . [predecessor] unit'; that the court held in *N.L.R.B. v. Hudson River Aggregates, Inc.*, 639 F.2d 865 (2nd Cir. 1981) that continuity in the identify of the work force is one of the most important considerations; that while Respondent Armco did introduce a limited number of maintenance personnel from the steelmill for sporadic assignments at the coke plant, such limited assignments do not change the basic character of the coke-plant operation; that as pointed out in *Dixie Belle Mills, Inc.*, 139 NLRB 629 (1962), a single plant unit is presumptively appropriate; that the involved facility is a complete free-standing plant; and that under *Burns, supra,*

and *Spruce Up Corporation*, 209 NLRB 194 (1974), since there has been a complete and total continuity in the employing enterprise, Armco is a successor.

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In addition to making some of the same arguments advanced by General Counsel, Charging Party Bank contends that while Armco and the Steelworkers will not doubt argue that Armco's takeover of the coke plant entailed substantial changes in terms and conditions of employment there, such changes do not affect the actual service rendered, the methods used to render the service, or the skills used to render the service, and, therefore, successorship is not defeated. *Saks & Co.*, 634 F.2d 681, 686 (2d Cir. 1980). Bank contends that, furthermore, unilateral changes made by an employer in violation of its duty to bargain with the union representing the acquired facility may not be used to show that an alleged successor has made changes which defeat successorship; that following the sale, changes in terms and conditions of employment at the coke plant resulted directly from Armco's recognition of the Steelworkers as the collective bargaining agent for coke plant employees, and from consequent imposition of the Armco-Steelworkers agreements upon coke plant employees; that because Armco knew before it purchased the coke plant that the majority of its coke plant work force would be composed of former coke plant employees represented by the OCAW, Armco had the duty to recognize and bargain with the OCAW; and that it follows that any changes in terms and condition of employment at the coke plant wrought by imposition of the Armco-Steelworkers agreements cannot be invoked as factors weighing against successorship.

While the above-described factors standing alone are sufficient, in my opinion, to establish a successor relationship, Armco, at page 62 in its brief, contends that:

> [o]nly if it is determined that the acquisition by Armco of the coke facility and its integration into the operation of the Ashland Works did not fundamentally alter the unit in which the coke employees reside, *i.e.*, if there is no accretion, does successorship even become an issue. [footnote omitted.]

And the Steelworkers contend on brief that the inquiry necessarily begins with accretion in a situation where there is an interplay between it and the successorship doctrine.

A necessary predicate for imposing the duty to bargain is the retention of the predecessor's employees and the continued appropriateness of the unit. Burns, supra. If the unit is changed for valid economic and operational reasons, "the employees original choice of bargaining representative is sufficiently vitiated to require reexamination." *N.L.R.B. v. Security-Columbian Banknote Co., supra*, at 139. The court went on at 140 to define an accretion as the,

> incorporation of employees into an already existing larger unit when such community of interest exists among the entire group that the additional employees have no separate unit identity. Thus, they are properly governed by the larger group's choice of bargaining representatives.

It then pointed out at 149 that "the Board has restrictively applied the accretion principle since it operates to deny the accreted employees a vote on their choice of bargaining representative."

[ALJ 54]

Subsequently, the Board in *Weatherite Company, Inc.*, 261 NLRB 667 (1982) stated:

> [a] fundamental consideration in determining an accretion issue is to 'assure employees the fullest freedom in exercising their rights guaranteed by the Act

> . . . .' Section 9(b), NLRA; *Melbert Jewelry Co., Inc., and I.D.S.-Orchard Parks, Inc.*, 180 NLRB 107 (1969); *Peter Kiewit Son's Co.*, and *South Prairie Construction Co.*, 231 NLRB 76 (1977).

As pointed out in *Mego Corp.*, 254 NLRB 300 (1981), the factors to be considered in determining whether there has been an accretion are as follows: (a) centralization of hiring in all plants and personnel management (in charge of pesonnel matters including grievances) with a common labor policy, (b) the degree or percentage of employee interchange and transfers, (c) geographical proximity of plants, one to the other and the significance of their separation, (d) frequency of transfer of machinery between or among the plants, (e) similarity in work and required skills performed, (f) the degree of functional intergration of business operations, (g) frequent visitation of production manager to all employer plant facilities, (h) commonality of supervision at all plants, (i) uniformity of wages, hours, and working conditions, (j) history of collective bargaining and community of interest of the employees in the facility sought to be accreted, and (k) local control over the day-to-day operations of the plant in which the employees are the subject of accretion.

The Administrative Law Judge went on at page 310 in *Mego Corp., supra,* to indicate:

> [w]hile the cases do not indicate that the above list of factors are in any way exhaustive and conclusive, it would appear from an examination of the cases that the presence of all, or any substantial combination, of these criteria can provide a reasonable basis to support a conclusion that the business operations (the complement of workers, the production process, etc.) are not so intertwined with the overall operation of the employer that the employees in the new facility should be accreted to the employerwide unit.

The coke department is now one of 16 operating and maintenance departments at Armco's Ashland operation. All of the hiring, personnel and labor relations policy functions relating to the coke facility are now consolidated in the Works staff. The only labor relations function now performed by the coke department, as in the other departments, is the processing of production workers' grievances. Grievances filed by maintenance employees are appealed from the foreman to the maintenance superintendent, bypassing Washburn.

Regarding the degree or percentage of employer interchange and transfers, Armco argues that the standard steel industry seniority structure which Armco extended to the Coke Department immediately upon acquisition of the facility from Allied provides for inter-departmental transfers; that while no such transfers involving either Coke Department jobs or Coke Department employees had taken place at the time of the hearing, this was due entirely to the

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depressed level of business activity at the Ashland works; and that in the circumstances which existed at Ashland at that time, and had existed for many months prior to the hearing, laid-off employees claimed all departmental entry-level vacancies as soon as they occurred. According to Armco this is a temporary condition, however; at some point all laid-off employees either will have been recalled to jobs or their service will have been broken because they will not have been recalled within the time limits established by the Basic Agreement, and from that point forward, entry-level departmental vacancies will be filled by plant-wide posting and inter-departmental transfers will occur. Armco goes on to argue that in the approximate 19-month period between the date of the involved acquisition and the hearing herein the equivalent of approximately 24 maintenance employees from the Central Shops

group, as opposed to the Assigned Maintenance personnel who regularly work at the Coke facility, were fully employed making repairs in the Coke facility; and that, therefore, there has been significant actual interchange of employees between the Coke Department and the main plant but, more importantly, the seniority system which is in place assures that over time there will be continuous transfers between departments. It is pointed out by Armco that Coke Department jobs are among the least desirable in a steel mill; that for this reason, in integrated operations the Coke Department tends to be the department of first assignment where newly-hired employees are heavily represented; and that generally speaking, employees transfer out of the Coke Department when their seniority permits them to do so.

General Counsel contends that there is practically no interchange among the two plants; that none of the former Allied employees ever go to work at the steel mill, and the few maintenance craft employees who occasionally work at the Coke plant are kept separate from the Coke plant employees because if the steel mill employees came into contact with the coke plant employees, the steel mill employees would become contaminated and, therefore, would have to follow special OSHA regulations.

Charging Party Bank contends that, as pointed out in the minutes of the negotiating sessions, the coke plant and the Ashland Works employees were intended to remain essentially separate; that production employees at the coke plant do no work at the Ashland Works and production employees at the Ashland Works do no production work at the coke plant; that assigned maintenance employees at the coke plant do no maintenance work at the Ashland Works; and that an average of only 24 Ashland Works maintenance employees supplements the 350-400 person workforce at the coke plant.

OCAW argues that while the use of Central Shop crews may result in savings for the Employer, as Armco contends, it does no more to destroy the separate identity of the coke plant bargaining unit than would a decision to subcontract certain maintenance and repair functions to a separate employing entity. Also, OCAW contends that Armco effectively isolated the coke plant employees from the steel mill bargaining unit by manipulation of seniority and job bumping procedures; and that since the takeover, the coke plant employees have remained a distinct and isolated group.

With respect to geographic proximity and its significance, Armco points out that the Coke facility is only a couple of miles from the Works and that for steel operations, this is a modest distance in that until very recently, Armco's Middletown, Ohio Works included coke ovens in Hamilton, Ohio, a

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distance of 10 to 15 miles from the central Middletown location. Other similar record examples are cited. Armco contends that geography poses no obstacles to a single unit in this case.

General Counsel argues that the coke plant has its own, separate identity and even has its own Federally-Chartered Credit Union. OCAW adds that the facilities maintain separate time clocks and telephone exchanges.

There is no transfer of machinery between the Coke facility and the Works.

Regarding similarity in work and required skills performed, Armco contends that wherever in the domestic steel industry a coke department exists as pact of a steel-producing operation, the employees of the coke department are included in a multi-department bargaining unit; that at least since 1974, the employees assigned to the coke departments of these integrated operations have had the

right to transfer to other departments, and employees assigned to other departments have had reciprocal rights with respect to the coke department; that the Steel Industry Consent Decree in the Allegheny-Ludlum case was entered April 12, 1974. *U.S.* v. *Allegheny-Ludlum Industries, Inc.*, 63 F.R.D. 1 (N.D. Ala. 1974), *aff'd*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) and a primary objective of the Consent Decree was to create transfer opportunities so that employees in locked-in departments—coke was a classic example of such—could sooner or later move out of them if they wished; that separate representation would be directly antithetical to that purpose; that one of the principal objectives of the Government Plaintiffs in the *Allegheny-Ludlum* case was to eliminate the disincentives to inter-departmental transfers embodied in the industry's previous seniority system for the express purpose of enabling coke department employees to transfer out of that department; that the industry's seniority structure thus confirms that the working conditions, skills and functions of coke department employees are similar to those of employees in other operating departments; that while it does not follow that an employee from another department can peform all of the jobs in the Coke Department since every department has some jobs which are unique to it, this problem is addressed by the industry's line-of-progression seniority system under which employees transferring into a new department are assigned to entry level jobs at the bottom of a line-of-progression; that these so-called "walk up and do" jobs do not require previous experience; that employees then advance, on the basis of their seniority, up the line-of-progression into increasingly responsible and complex jobs acquiring necessary departmental skills and experience as they advance; and that coke department jobs are as readily adaptable to this system as were the jobs in other departments.

The Steelworkes contend that the important fact is that the job skills in a steel mill are sufficiently similar, and that with the on-the-job training acquired through progression, or otherwise, employees readily move up the job ladder and just as readily transfer from department to department, including transfer into or out of coke departments in plants throughout the basic steel industry. In other words, the Steelworkers contend that the functions which coke workers perform do not contain a skill component which exempts them from the transfer and on-the-job training processes.

[ALJ 57]

General Counsel argues that although Respondent Armco uses a corporatewide system of uniform job classifications and it appears that there are the same job titles at the coke plant and at the steel mill, the men at the coke plant who may have the same job title as a man at the steel mill, do not perform the same functions. Additionally, it is pointed out that there are job classifications at the coke plant which do not exist at the steel mill, simply because of the differences in the type of operations at each location.

Charging Party Bank contends that skills and work at the coke plant and the Ashland Works differ in that there are machinery and processes at the coke plant which simply do not exist at the Ashland Works; that Armco officials admitted outright that the skills necessary to perform some of the work at the coke plant, expecially in maintenance classifications, did not exist at the Ashland Works; and that Armco's proposal of December 8, 1981 was explicitly intended to prevent transfer of the experienced workforce at the coke plant confirming Armco's view that work and skills at the coke plant and the Ashland Works differ substantially.

It is argued by OCAW that the employes at the coke plant are engaged in a manufacturing processes essentially

different from the operations at the steel mill and use different equipment; that they are exposed to occupational hazards not experienced by steel mill employees, most notably carcinogenic emissions; that they have different skills; that their skills were, in fact, a primary reason for Armco's employing them at all; that Armco explained several times during negotiations with the Steelworkers that it needed the expertise of the coke plant employees; and that the steel mill employees were not trained to operate the coke plant equipment.

With respect to the degree of functional integration of business operations, Armco contends that functional integration is a characteristic of steel making operations; that the coke and blast furnace departments are functionally interdependent; that given this relationship, it is apparent that no responsible steel employer could confront the possibility of a work stoppage in the coke department without taking defensive steps to protect the blast furnaces from physical damage; that since coke may not be available on the open market and, even if available, may be of unacceptable quality, the only real recourse is to maintain an inventory of coke at the blast furnaces as insurance against a work stoppage; that this is what Armco was compelled to do during the period of Allied ownership; that each 30-days of inventory represents a $7 million investment in unproductive assets; that a minimum prudent inventory at contract expiration time—assuming separate coke department representation—would be one-half of that period or 42 days; that because coke is such a "vital ingredient" in the steel-making process, the people in control of that ingredient have "considerable leverage" and they might "exercise that leverage for their own specific interests"; that the bottom-line, inescapable fact is that a separately represented coke department would have bargaining leverage against the employer to a degree totally disproportionate either to the coke department's contribution to the total steel-making process or to the

numerical representation of the department's employees in the total labor force; and that the capacity of such a separately represented unit for disruptive conduct literally would be unlimited.

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General Counsel argues that the coke plant employees have an unusually distinct identity which is completely separate from that of the employees in the steel mill as demonstrated by Maddox's statement made back in August 1982, when he wrote to Respondent Steelworkers Local 1865, in denying a grievance, that "[t]he coke Department is an entirely new operation at the Ashland Works and it is unlike any existing facilities or operations at the plant"; that this is so because of the nature of the operations of a coke plant which is distinctly different from that of a steel mill; and that for example, there are special regulations promulgated by OSHA for coke plant employees to reduce the levels of contamination.

Charging Party Bank contends that the Ashland Works is dependent upon more than coke to keep its "integrated" operations going; that coal, limestone, iron ore and oxygen are all produced outside the Ashland Works; that a lack of any of these raw materials could shut down the blast furnace; that accreting the coke plant into the Ashland Works will by no means assure the continuous operation of the steel mill; and that the Board has never ruled that the integrated nature of the steel industry makes a merged unit the only appropriate unit where an acquired facility maintains its essential identity. Indeed, Bank points out that in an analogous context the Board has ruled that discrete craft units may be severed from industrial units in highly integrated industries, including the steel industry. *Mallinckrodt Chemical Works*, 162 NLRB 387 (1966).

It is contended by OCAW that the steel mill and the coke plant are not functionally integrated operations since the two facilities produce entirely different products. As-

sertedly, while some, though by no means all, of the products manufactured at the coke plant are used as fuel for the steel mill blast furnaces, and although Armco introduced evidence that coke is necessary to the operation of the steel mill and that close coordination is required in fueling and manufacturing processes, the relationship between the operations has not changed since Armco purchased the coke plant. OCAW argues that the manufacture of coke and the manufacture of steel are no more functionally integrated than before the sale, when the two employee groups were unquestionably separate appropriate units.

Certain factors will be covered collectively, namely frequent visitation of production managers to all employer plant facilities, commonality of supervision, and local control over the day-to-day operations of the plant in which the employees are the subject of accretion. Armco points out that Allied's coke plant manager, Washburn, became Armco's Superintendent of the coke department; that under Allied the coke facility was a self- standing, profit generating unit and Washburn enjoyed substantial managerial autonomy; that under Armco the coke department Superintendent now has exactly the same degree of authority as do the Superintendents of the other departments, which authority essentially is confined to operating matters; and that the performance of maintenance work in the coke department is the responsibility of others, although the coke department Superintendent, like all other department heads, has overall responsibility for seeing to it that his facility is adequately maintained. The coke department Superintendent reports to an area superintendent and ultimately to the Works manager.

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Charging Party Bank contends that control over the day-to-day operations of the coke plant remains local. It is pointed out by Bank that a substantial majority of the

first-line supervisors are holdover Allied supervisors; and that Washburn, who ran the coke plant for Allied, ran Armco's coke "department" on a day-to-day basis at the time of the hearing.

It appears that there is uniformity of wages and hours under the existing collective bargaining agreement between Armco and the Steelworkers, as supplemented by these parties. The working conditions at the coke facility are quite different than those at the Works, however. As noted above coke facility employees are exposed to occupational hazards not experienced by steel mill employees, *i.e.*, carcinogenic emissions. Also, as noted above, there are special OSHA requirements or coke over standards. Bank contends that to the extent Armco has imposed uniform wages, hours and working conditions at the coke plant and the Ashland works, uniformity results solely from Armco's alleged unlawful pre-hire recognition of the Steelworkers and as a result, these changes must be disregarded.

With respect to the last factors to be considered, namely, the history of collective bargaining and community of interest of the employees in the facility sought to be accreted, Armco contends that the bargaining history relates to a period when, first, the coke facility unquestionably was a "plant" for purposes of Board unit determinations and, second, the facility was engaged in the commercial coke manufacturing business; that neither of these conditions now exists; that the facility is a department of the Ashland Works and it lacks the managerial autonomy characteristic of a "plant"; that the facility is no longer competing independently in the market for commercial coke; that these two changed conditions, without more, go far toward rendering irrelevant the bargaining history developed under Allied ownership; that bargaining relationships do not exist in a vacuum, but rather they are a manifestation of specific economic and managerial circumstances, and history based on one set of such circumstances affords

little guidance with respect to a unit determination based on a wholly different set of circumstances; that the only relevant bargaining history in these new circumstances is the history of steel industry bargaining and, specifically, the history of that bargaining as applied to the Ashland Works; that where, as here, the only serious factor even arguably contrary to accretion is bargaining history, reliance on that to deny accretion would violate Section 9(c)(5), 29 U.S.C. Section 159(c)(5) of the Act, which declares that extent of organization cannot be controlling in unit determinations; that where, as here, the new circumstances alter the circumference of the unit in which the employees resisting accretion find themselves, the policies of the Act do not favor employee determination of the unit in which they will exercise their Section 7 rights; that by far the most relevant bargaining history in this case is not the bargaining history of the Coke Department employees when they were employed by Allied for there are many cases which established that where the employer and/or the industry pattern is the larger unit, this, and not the pre-acquisition bargaining history of the resisting employees, is the principally relevant bargaining history; that the accreted employees attachment to their old union is specifically not a bar to accretion; and that the essence of accretion, when it is ordered, as it should be here, is to place the accreted employees in the situation where they can most effectively and productively exercise the Section 7 rights guaranteed them by the Act.

[ALJ 60]

Regarding the community of interest factor, Armco contends that with the sale a new community of interest, between the coke employees and the rest of the Armco employees, was established; that the old community of interest, which had practically expired, was not restored but rather, a new community came into being; that the coke facility employees have become a part of the community in which all other employees at the Ashland Works share,

a community which is bound together by the common and overriding interest in the maintenance of their jobs, the survival of the Works and the economic preservation of the beleaguered industry of which they are a part; that while it is apparent that some, at least, of the Coke Department employees simply reject these realities and seek to go forward as though no change in their circumstances has occurred, only perverse results could flow from establishing a separate unit in the coke department; that the coke department no longer has its "own destiny" since its own destiny, as a separate Allied plant with separate representation, had come to a complete dead end even prior to the Armco purchase, not because Armco bought the coke plant but because immutable economic forces had destroyed its separate destiny; that with its rescue by Armco the coke operation now has a common destiny with the other Departments of the Works, and no destiny other than that; that to encourage a contrary view can lead only to divisiveness and conflict at a time when cooperation and unity are essential if the jobs of all are to be saved; and that "the shortsighted insistence of some of them [coke facility employees] on being a separate unit cannot be accepted." Respondent Armco's brief, page 21.

Regarding these last two factors, the Steelworkers make the same arguments as Armco, and also the Steelworkers contends that with respect to the industry pattern of coke oven representation in particular, the record evidence and the Board's cases demonstrate that of the dozens of coke plants associated with steel mills in the United States, not one is represented as a separate bargaining unit; that all, including those operated by Armco, are part of the larger, plant-wide, units; and that while a single coke facility in Granite City, Illinois, was identified as separately represented by virtue of historical accident, it turns out that the coke employees in question are not represented separately, but as part of a much larger unit which includes, *inter alia*, blast furnace workers. *Granite City Steel Com-*

pany, 211 NLRB 880, 881, 886 (1974); *Granite City Steel Company*, 137 NLRB 209.

General Counsel urges that it be noted that none of the coke plant employees who testified said they wanted to be members of Respondent Steelworkers; and that even Greg Shelton, an officer in Respondent Steelworkers, admitted that he knew the coke plant employees would "rather be represented by O.C.A.W." Assertedly, in this type of case, the Supreme Court has held that the wishes of the employees are a factor to be considered when determining which union is to represent the employees. See, *Pittsburgh Plate Glass Co.*, v. *N.L.R.B.*, 313 U.S. 146 (1941).

Charging Party Bank contends that the most important factor militating against accretion is the bargaining history at the coke plant and the overwhelming preference of coke plant employees for the OCAW representation which they have enjoyed for 30 years; that this preference has been reaffirmed overwhelmingly at meetings of the entire coke plant complement of hourly employees several times; that coke plant employees have financed litigation to maintain their OCAW status out of their own pockets; that while the OCAW is willing to test the coke facility employees' preference through an election,

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the Steelworkers have declined to do so; and that the preference for OCAW representation is rooted solidly in history and tradition and in the structural differences between the two unions.

OCAW contends that while Armco officials testified at the hearing that it is not uncommon for steel and coke plant employees to be included in a single bargaining unit in integrated steel facilities, and cited several examples of such arrangements, the Respondents produced no evidence that any coke plant had ever been accreted to a pre-existing bargaining unit of steel mill employees, and no evi-

dence that such arrangements had been authorized or required by the Board.

Regarding the community of interest, Bank contends that the coke plant employees also have a clearly defined and unbroken community of interest in that they are all former Allied employees and they work at a discrete facility at which they have always worked, at jobs they have always done; that coke plant employees have little community of interest with Ashland Works employees since the production of coke and coke by-products, while essential to the Ashland Works, is self-contained; that neither functionally, nor for raw materials, is the coke plant dependent upon the Ashland Works; that except for the 24 Ashland Works employees who supplement coke plant maintenance, coke plant employees have no functional or personal contact with Ashland Works employees; that coke plant employees are governed by health and safety concerns and regulations which do not affect or interest Ashland Works employees; that Ashland Works employees and the Steelworkers have demonstrated unwavering hostility and negligence concerning the legitimate concerns of coke plant employees and these attitudes, as a practical matter, rule out any community of interest between the two groups, that when Armco bought the coke plant, the Steelworkers knew nothing about the operation and yet no coke plant employee was ever consulted about the substantive terms and conditions of employment for the coke plant which the Steelworkers negotiated with Armco; that during negotiations with Armco, the Steelworkers made it plain that they were representing the interests of the 3,700 Ashland Works employees they traditionally represented, and not the 400 coke plant employees, that they were even reluctant to take coke plant employees into their union; that the Steelworkers, against Armco's wishes, insisted upon depriving coke plant employees of their Allied seniority, leaving them vulnerable to wholesale replacement by laid-off Ashland Works employees; that following ne-

gotiations with Armco, the Steelworkers continued to treat coke plant employees as second-class members; that the Steelworkers ignored pleas by coke plant employees for protection from replacement by laid-off Ashland Works employees, until the OCAW filed charges against Armco; that the Steelworkers invited coke plant representatives to out-of-town conferences to discuss coke plant problems, but refused to pay the lost-time wages and expenses of such employees, while normally it provides reimbursement for Ashland Works employees; and that the Steelworkers took a cavalier and insensitive attitude towards the lack of health and safety facilities and procedures at the coke plant.

As pointed out in *Mego Corp, supra,* citing *The Wackenhut Corporation,* 226 NLRB 1085 (1977), which in turn cited *Sheraton-Kauai Corporation* v. *NLRB,* 429 F.2d 1352 (1970), where employees in a new or smaller facility are accreted or absorbed into an existing and larger area-wide unit, the Section 7 rights of the accreted employees are more at stake, because they are deprived of the

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opportunity to participate in the representation issue as did the employees in the larger unit. For this reason the defense of accretion has been narrowly construed. In *Wackenhut Corporation, supra,* it was stated that:

> [i]n circumstances which have indicated that the larger areawide unit and a location may both be considered to be appropriate units the Board has refused to add the employees to the larger unit. The Board has said 'We will not, however, under the guise of accretion, compel a group of employees, who may constitute a separate appropriate unit without allowing those employees the opportunity of expressing their preference in a secret election or by some other evidence that they wished to authorize the Union to represent them.' [footnotes omitted.]

Can the coke facility employees still be considered an appropriate separate unit? After balancing the above-described accretion factors, it is my opinion that, notwithstanding the fact that operations in the steel-making industry are highly integrated and bargaining generally has proceeded on a system-wide basis, the separate identity of the involved coke facility employees has not been obliterated. Changes have occurred in the day-to-day operations of the coke facility but they are not so substantial that they have made a separate unit inappropriate.

Transfer of employees between coke facilities and steel mills has historically been an industry problem, even in the best of economic times. Here the situation was exacerbated by Armco's desire to keep experienced coke workers at the coke facility as long as possible and the Steelworkers' position regarding the seniority of Allied employees. Except for entry level positions, the coke facility jobs are not routine or unskilled but rather they require special experience. And that experience, with the exception of certain maintenance tasks, could not be gained from any foreman who worked strictly in the mill. Clearly coke production work differs from steel production work both in terms of skills and the machinery utilized. Also, regular coke facility workers face hazards not faced by steel mill workers. To the extent that interchange has occurred it has been minimal and one-way.

At first blush it would appear that the coke facility has become an intimate part of Armco's continuous production of steel, especially in view of Armco's contention on brief that "the coke is moved directly, *while still warm*, to the blast furnace area where it is charged together with iron ore in pellet form and limestone, into the furnaces." (Emphasis added.) Armco's brief page 25. Snyder testified that a 1 or 2 day supply of coke was maintained in railroad cars at the time of the hearing. And Maddox testified about the possibility of stockpiling a 3-month supply of coke. Undoubtedly that coke would not be kept warm.

Armco requires coke for its manufacturing process but it was not demonstrated that it needed warm coke. While the word "warm" may have been utilized merely to emphasize that the coke moves directly from the coke facility to the blast furnace, the coke, like the iron ore and limestone, is nothing more than a material used in steelmaking. The continuous process does not begin at the coke facility but rather at the blast furnace.[30]

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Consequently, while some coke facilities may historically have become part of integrated steel works, some exist, as Allied did, separate from the steel mill and they are in effect nothing more than suppliers of a material used in steelmaking. Coke may be an essential ingredient in steelmaking but the coke facility and its employees are not an essential part of the continuous production process.[31] Admittedly Armco at Ashland has become dependent

[30] While both Armco and the Steelworkers cite *Tennessee Coal, Iron and Railroad*, 39 NLRB 617 (1942) for its language dealing with a coke facility and functional integration in the steel industry, only the former attempts to explain a footnote in that decision, note 19, which indicates that [i]ntergrated operation extend . . . . from [the] blast furnace to the finished rolled-sheet product . . . ." Armco's explanation suffers, however, from the failure to cite authority other than the testimony of Maddox who, as indicated above, is Armco's manager of Human Resources and who, at those pages cited in the transcript was not testifying about "the economic unit in the steel industry today," Armco's brief page 32, but rather about his perception of Armco's situation in Ashland. Also it is noted that in that case, a petition for representation case, the Board indicated that the unit proposed did not comprehend even a segregable or functional group of employees.

[31] A case cited by both Respondents, *National Tube Company*, 76 NLRB 1199 (1948) dealt with an attempt by bricklayers who were engaged primarily in the construction and repair of blast furnaces and related equipment or as the Board, at 1207, stated "the instrumentalities used in the continuous production of steel," to sever themselves from a long-established industrial unit in the steel industry. Here we are dealing with a product utilized in steelmaking and not an instrumentality of the continuous process.

on a supply of coke from the facility but that dependence does not make the facility part of the continuous process. What it does do is allow Armco to avoid having to stockpile large amounts of coke and it assures the quality of coke Armco's uses. But this in and of itself or even in conjunction with certain other factors discussed below does not preclude the employees in the coke facility from being a separate appropriate unit. *Mallinckrodt Chemical Works, supra.* What were separate units do not automatically merge where integration is lacking.

Before the involved purchase, coke facility employees had a certified bargaining representative for almost 30 years. That representative was not the Steelworkers. The pattern of bargaining for these employees has been on a single-plant basis; the facility was not merged into a more comprehensive unit by bargaining history before the purchase. While the pattern of bargaining in the steel industry is usually not less than system wide, in view of *Mallinckrodt Chemical Works, supra,* where an appropriate unit can exist separately, industry practices should not preclude it.

By virtue of their separate existence, separate location, and separate collective-bargaining history before the purchase, coke facility employees enjoyed a community of interest separate from the Works. In my opinion, in view of the functional distinctness, different skills and training, different work environment,[32] geographic separation, general lack of personal contact

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[32] In view of the work environment at the coke facility, the involved employees need a bargaining representative which has their interests, especially safety and health, at heart. The above-described "bug-pond" incident is illustrative. It should not have been necessary for the coke facility employees to have to complain to their bargaining representative a second time. Until they did, they incurred an unnecessary risk of being overexposed, to a degree (5 parts per million) to a lethal gas. The problem should have been properly remedied in response to the first complaint.

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with works employees, and partial autonomy, coke plant employees continue to have a community of interest separate from the Works employees. Their separate community of interest has not been submerged into any broader community of interest because there is no high degree of integration of the two and there is no "intimate" connection between the coke facility employees' function and the continuous steelmaking process.

While, as contended by Armco, geographic separation of a coke facility and a steel mill is not uncommon in the steelmaking industry, certain concomitant circumstances cannot be overlooked, namely, coke facility employees have virtually no daily contact with Works employees, they report to different geographic locations, and they have separate timeclocks, telephone exchanges, and credit unions. Also, the coke facility has all of the machinery needed to process coke; there is no transfer of machinery between it and the Works.

Although both the coke facility and the Works are under the same ultimate supervision, the day-to-day coke facility operating matters were handled, at the time of the hearing herein, by the same man who ran the coke plant under Allied, Washburn. Many of Allied's coke plant supervisors were hired by Armco to work in the coke facility. Consequently, supervision, from the coke facility employees' point of view, changed little except that maintenance worker grievances no longer go from a foreman at the coke facility to Washburn but rather go to Superintendents of Maintenance.

As noted above, there is centralization of hiring and personnel management and a common labor policy. Also there is general uniformity of wages, hours, and terms of employment.

In my opinion the factors favoring accretion do not outweigh the factors which do not favor it. It has not been

demonstrated that a separate unit of employees who work at the coke facility is inappropriate. Significant changes did not occur in the day-to-day operations of the coke facility. As noted above, a single-plant unit, being one of the unit types listed in the statute as appropriate for bargaining purposes, is presumptively appropriate. Here the single-plant unit had a separate bargaining history with a certified representative. It has not been demonstrated that the coke facility has been so integrated with Works so as to negate the former's identity.[33]

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[33] Cases cited by Respondents are distinguishable. For example a number involve public utilities, which the Board treats differently because of the role they play. Unlike the situation at hand, in *Border Steel Rolling Mills, Inc.*, 204 NLRB 814 (1973), the involved employees worked on the purchasing employer's premises before the purchase, even before the purchase the two operations were practically integrated, the purchasing employer staffed the accreted unit with a substantial number of its own employees on a permanent basis, the purchasing employer did not hire the predecessor's supervisors, the duties of the employees in the accreted unit changed, and there was a two-way interchange of employees. Unlike the situation at hand, in *Lansing General Hospital*, 220 NLRB 1 (1975) the accreted employees were allowed to retain their old seniority, they already worked on their new employer's premises, the functions of the employees in the accreted unit were expanded so that they performed tasks previously performed by the pre-existing unit, those in the accretion unit are in daily contact with those in the pre-existing unit, all employees use the same timeclock, and those in the accreted unit did not possess any unique skills or specialized training which would justify their exclusion from an overall service and maintenance unit. Unlike the situation at hand, *Joseph Cory Warehouse*, 184 NLRB 627 (1970), a petition for clarification proceeding, did not involve a successorship question and there it was contended that the involved employees would not perform their daily tasks in an efficient manner but rather threatened to strike if the employer attempted to fully integrate its operations. Here the involved employees are not refusing to perform their day-to-day functions in an efficient manner. And, unlike the situation at hand, in *Noranda Aluminum Inc.*, 186 NLRB 217 (1970) the vast majority of employees in the involved department were hired as trainees, the job function of many of the employees throughout the facility are either identical, or require comparable skills and training, and the involved employees did

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Another defense asserted is that OCAW waived whatever claim it might have had to represent the former Allied employees by yielding representational rights to the Steelworkers. On brief, page 72, Armco asserts:

> Armco, a company experiencing significant losses as part of an industry beset by economic woes, cannot reasonably be presumed to have entered into a 100 million dollar expenditure *without clear assurance* that the potential dispute over which union would represent the coke facility employees had been resolved. Goss would have us believe that Armco did so on the basis of his statement that he might at some point 'consider' releasing those employees. [Emphasis added.]

This contention raises a number of questions, namely, where is the clear assurance, was it communicated from OCAW directly to Armco, did Armco ever attempt to communicate directly with Goss regarding the situation, was Armco experiencing significant losses in November and December 1981, was the steel industry beset by economic woes in November and December 1981, if Armco was that concerned about obtaining a clear assurance before it "entered into . . . [the] expenditure" why did it announce at the outset, before it knew OCAW's position, that it would not recognize OCAW and that the involved employees would become members of the Steelworkers, why was this position irrevocable from the outset, and why were Armco officials advised that if OCAW demanded recognition before the purchase agreement was effective, such demand would be denied. The fact of the matter is that Armco was not really concerned with what OCAW's position was, it did not seek any "clear assurance" from OCAW. It is

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not possess as a group any unique skills other than those in which they were trained by foremen from throughout the facility.

not "presumed" that Armco proceeded without a "clear assurance." The facts speak for themselves.

Regarding this defense, General Counsel contends that OCAW regarded Responent Armco's decision in November and December 1981 as an anticipatory repudiation of its bargaining duty and any request by OCAW for recognition and bargaining would have been futile. *Spruce Up Corporation*, 209 NLRB 194, 197 and *Honda of America Mfg., Inc.*, 259 NLRB 389 (1981) at fn. 3, page 390, that when a union is clearly faced with a fait accompli, it does not have an

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obligation to make a futile request for bargaining, *L.E. Davis d/ b/a Holiday Inn of Benton*, 237 NLRB 1042 (1978), enf'd, 617 F.2d 1264 (7th Cir., 1980); that as indicated by the Board, at page 1044, in *L.E. Davis, supra*, the employer's "unilateral actions clearly conveyed the message that the decision was made on an irrevocable basis and that such a request for bargaining would have been futile, *P.B. Mutrie Motor Transportation, Inc.*, 226 NLRB 1325, 1329 (1976)"; that it should be noted that both the Board and the courts have held that a union "will not be held to have foregone a statutory right absent a 'clear and unmistakenable' waiver." *Local 669, Road Sprinkler Fitters v. NLRB*, 600 F.2d 918 (D.C. Cir., 1979) at page 921; and that therefore, neither the International OCAW nor its Local was obligated to make a futile demand.

Charging Party Bank contends that for a viable incumbent union to disclaim its interest in continuing to represent employees, the disclaimer must be unequivocal and directed to the employer, citing *NLRB v. R.L. Sweet Lumber Co.*, 515 F.2d 785, 795 (10th Cir. 1975), enforcing 207 NLRB 529 (1973), cert. den. 423 U.S. 986 (1975), *East Mfg. Corp.*, 242 NLRB 5 (1979), *American Sunroof Corp—West Coast, Inc.*, 243 NLRB 1128 (1979), and *Park-Ohio Industries v. NLRB*, 702 F.2d 624 (6th Cir. 1983).

The record fails to demonstrate that there was a clear and unmistakeable waiver. As noted above, Goss' testimony, which is corroborated by the testimony of other witnesses and documents drafted and distributed at the time in question, is credited. The assertions which conflict with the evidence adduced by OCAW witnesses are not credited.

The involved employees were not accreted and OCAW did not waive its interest in representing them. Consequently, by granting recognition to the Steelworkers and by enforcing their supplemented collective-bargaining agreement and its provisions, including those regarding union security and checkoff as to the coke facility employees, Respondents Armco and the Steelworkers violated the Act.

Hewlett never denied that on January 9, 1982 he said "if you don't sign it, you don't work." While apparently Armco officials were not present during the union presentation at the orientation meetings, the reverse was not true. The cards were handed out during the first part of the orientation, the Company portion, and they were signed, collected and witnessed during this portion. Logically, if questions were raised about the cards, therefore, they would have been raised during the Company portion of the meeting. There were approximately 175 workers in the room at the time and it is possible that Lester did not overhear all that was said about the cards. Salyer did not impress me as being a credible witness. A number of witnesses testified that they were advised that they had to sign the card. This was not a point of contention that first arose at the orientation meetings. Thompson, a staff representative of the Steelworkers did not deny that he and McKeand discussed the matter before the purchase. Maddox testified that he was aware before the orientation meetings that there had been some discussion on the involved employees' part about whether they should sign such cards.

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So, both Armco and the Steelworkers were placed on notice that the involved employees were concerned about signing Steelworkers cards. Nevertheless, measures were not taken to assure the involved employees that they were not being coerced, or at least, if such measures were taken they were not made a matter of record.[34] Rather, the evidence points to the fact that at the January 9 orientation session the employees believed they had no choice but to sign both sides of the cards that day when they were passed out. Each employee did. Respondents Armco and the Steelworkers violated the Act.

Respondent Armco admits that by letter dated April 15, 1982, OCAW sought recognition and collective bargaining. Armco's refusal to bargain with OCAW violated Section 8(a)(5) and (1) of the Act. Actually the violation did not first occur with this official demand. Rather, as General Counsel argues, Armco's announced anticipatory repudiation of its bargaining duty obviated the need for OCAW to make a demand for recognition and bargaining.[35] From the outset of its takeover Armco was in violation of Section 8(a)(5) an the Act.

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[34] While employee Pierce testified that someone explained the union security agreement, employee Leake did not remember Salyer fully explaining the union security provisions. Again, with a group of this size, something might have been said to someone on one side of the room and not be overheard by someone on the other side of the room. Lester, in explaining what the standard procedure was, did not indicate that the employees were fully advised as a group about the union security provision. Salyer did not testify about what may have been said about this provision.

[35] As pointed out in *Honda of America Mfg. Inc., supra*, note 3 at 390, "[i]n, view of Respondent's anticipatory repudiation of its bargaining obligation, we find immaterial the absence of an allegation in the complaint that the Union made a formal request that Respondent meet with it for purposes of collective bargaining."

As concluded above, Armco is a successor to Allied. Was Armco legally entitled to unilaterally set its initial terms and conditions of employment or was this, under the Supreme Court decision in *Burns Security Service, supra*, at 294-295, one of those

> instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms[?]

As pointed out by the Board in *Arden's*, 211 NLRB 501 (1974), on the one hand, in *Howard Johnson*, 198 NLRB 763 (1972) and *Good Foods Manufacturing and Processing*, 200 NLRB 623 (1972), Section 8(a)(5) of the Act is violated where the successor employer, without prior warning, unilaterally change the terms and conditions of employment prevailing under the predecessor after already having committed itself to hire almost all of the old unit employees with no notice that they would be expected to work under new and different terms. On the other hand, in *Spruce Up Corporation, supra*, the Board found no such such violation when the Respondent, in advance of its takeover,

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clearly announced its intent to establish a new set of terms and conditions of employment prior to inviting former employees to accept employment.

Here, as stipulated, Armco advised the involved employees and representatives of OCAW before the purchase that they would be covered by the agreement between Armco and the Steelworkers. Obviously, since Armco was not recognizing OCAW, it did not offer to negotiate any agreement with OCAW. In fact, although it attempted to find out exactly what was going on, OCAW International did not obtain what has been described as a copy of the

Memorandum of Understanding between Armco and the Steelworkers until about 2 weeks after the purchase.

As pointed out by the Board in *Arden's, supra,* at 502:

> [t]he need to reach what the Supreme Court in *Burns* called an 'accommodation between the legislative endorsement of freedom of contract and the judicial preference for peaceful . . . settlement of labor disputes' is, we suppose, the underlying consideration, but it, too, is not an easy accommodation to make under these facts. [There there was last minute notice to the employees and their bargaining representative.]

The Board in *Arden's, supra,* also at 502, in concluding, with reservations, that the situation there was more akin to *Spruce Up Corporation, supra* than *Howard Johnson, supra,* and *Good Foods, supra,* stated:

> [w]e are influenced in reaching that decision upon these facts by Respondent's clearly expressed willingness to bargain immediately with the employees' exclusive agent, and the absence of the factors of union animus or any attempt by Respondent to rid itself of the Union—factors which were present in *Howard Johnson* and *Good Foods, supra.*

Here there can be no question but that Armco did not express a willingness to bargain immediately with the employees' exclusive agent, OCAW, and clearly Armco wanted to rid itself of OCAW. Armco planned to and did retain all of its predecessor's employees. In these circumstances, it is my opinion that under *Burns, supra,* Armco should have initially consulted with OCAW before fixing terms. Armco did not. It acted at its own peril.

Upon the foregoing findings of fact, and upon the entire record in this proceeding, I make the following:

Conclusions of Law

1. Armco is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Steelworkers and OCAW are, and have been at all times material herein, labor organizations within the meaning of Section 2(5) of the Act.

3. The following described unit of Respondent Armco's employees is an appropriate one for collective-bargaining purposes:

[ALJ 69]

> All production and maintenance, all accounting clerical, office traffic clerical and stores clerical, plant chemist, research technicians, employees of the company at its Ashland, Kentucky [coke] plant, but excluding assistant plant controller, all employee relations department, plant buyer, storekeeper, draftsmen, and technicians of the plant engineering office, professional employees, guards and all supervisors as defined in the Labor-Management Relations Act, 1947.

4. At all times since 1952, OCAW, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the unit described above.

5. Respondent Armco is a successor of Allied and as of December 31, 1981 has employed employees in the above-described unit to operate its Ashland, Kentucky coke plant.

6. By recognizing Respondent Steelworkers as the bargaining representative of the employees of the Ashland coke plant, by entering into and maintaining a collective-bargaining agreement with the Steelworkers, and by requiring coke plant employees to execute Steelworkers dues checkoff and authorization cards as a condition of employment, when the Steelworkers did not represent a ma-

jority of the employees at the coke plant, Respondent Armco has violated Section 8(a)(1), (2) and (3) of the Act.

7. By accepting such recognition, by entering into and maintaining said agreement, and by requiring coke plant employees to execute Steelworkers dues checkoff and authorization cards as a condition of employment, when the Steelworkers did not represent a majority of the employees at the coke plant, Respondent Steelworkers has violated Section 8(b)(1)(A) and 8(b)(2) of the Act.

8. Since on or about April 15, 1982 and at all times thereafter, Respondent Armco has failed and refused to recognize and to bargain collectively in good faith with OCAW as the exclusive representative of Respondent's employees in the above-described unit, and thereby has engaged, and is engaging in, unfair labor practices within the meaning of Sections 8(a)(5) and 8(d), and derivately, Section 8(a)(1) of the Act.

9. By its December 31, 1981 changes in the rates of pay, wages, hours, and other working conditions of the unit employees from those prevailing immediately prior thereto, without prior proper notification and bargaining in good faith with the Union concerning such changes, Armco violated Section 8(a)(5) and (1) of the Act.

10. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

It having been found that Respondent Armco violated Section 8(a)(1), (2) (3) and (5), and 8(d) of the Act and that Respondent Steelworkers has violated Section 8(b)(1)(A) and 8(b)(2) of the Act, I shall recommend that Armco be directed to cease (1) granting recognition to Respondent Steelworkers as the collective-bargaining agent for the coke plant employees, (2) giving effect to

[ALJ 70]

the collective-bargaining agreement between Respondent Armco and Respondent Steelworkers for the employees at the involved coke plant, and (3) giving effect to any dues checkoff authorizations in favor of Respondent Steelworkers.

With respect to the dues of the coke plant employees, Respondent Armco shall jointly and severally with Respondent Steelworkers reimburse, with interest, the involved employees at the coke plant for any dues unlawfully withheld since January 1, 1982.

With respect to the unilateral changes made by Respondent Armco, I shall also recommend to the Board that the Respondent Armco, at OCAW's request, return to the *status quo ante* which was in effect prior to the Respondent Armco's implementation of such unilateral changes, with regard to the rates of pay, wages, hours, and other terms and conditions of employment, and that Respondent reimburse the involved employees for any monetary losses they may have suffered as a result of Respondent's unilateral changes, with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation,* 231 NLRB 651 (1977) (see generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962)), and continue such payments until such time as respondent Armco negotiates in good faith with OCAW or to impasse.

As pointed out in *Mego Corp., supra,* it would contradict the purposes of the Act if the coke plant employees were penalized by an order that on its face would seem to require Respondent Armco to withdraw certain benefits which have inured to the employees under the agreement unlawfully applied to them. Accordingly, the abrogation of said agreement shall be without prejudice to the employees' wages and other economic conditions and benefits now in existence.

A bargaining order will be recommended to remedy Respondent Armco's refusal to recognize and bargain with OCAW, as well as a remedy for the unilateral changes.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[36]

A. The Respondent Armco, Inc., Eastern Steel Division, Ashland Works (Armco), of Ashland, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Recognizing United Steelworkers of America, AFL-CIO, and its Local Union 1865 (Steelworkers) covering employees at the Ashland, Kentucky coke plant, when the Steelworkers does not represent a majority of the involved employees.

[ALJ 71]

(b) Giving effect to any collective-bargaining agreement entered into between Armco and the Steelworkers covering employees at the Ashland coke plant when the Steelworkers does not represent a majority of the employees, or to any of its terms or conditions and refrain from any renewal or extension thereof without prejudice, however, to any wages or benefits granted to Ashland coke plant employees thereunder.

(c) Giving effect to any dues checkoff authorizations in favor of the Steelworkers.

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[36] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections thereto shall be deemed waived for all purposes.

(d) Making changes unilaterally, without notice to or bargaining with the Oil, Chemical and Atomic Workers International Union, AFL-CIO (OCAW) in the rates of pay, wages, hours and other terms and conditions of employment of the employees in the unit described below. The appropriate unit is:

> All production and maintenance, all accounting clerical, office traffic clerical and stores clerical, plant chemist, research technicians, employees of the company at its Ashland, Kentucky [coke] plant, but excluding assistant plant controller, all employee relations department, plant buyer, storekeeper, draftsmen, and technicians of the plant engineering office, professional employees, guards and all supervisors as defined in the Labor-management Relations Act, 1947.

(e) failing and refusing to bargain with OCAW as the exclusive collective-bargaining representative of the employees of the Respondent in the unit described above.

(f) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Jointly and severally with the Steelworkers reimburse, with interest, Armco's employees at the Ashland coke plant, including former employees, for all dues paid to the Steelworkers since January 1, 1982.

(b) Upon OCAW's request restore the *status quo ante* which existed prior to the implementation of the unilateral changes made by Armco with regard to the rates of pay, wages, hours, and other terms and conditions of employment in the unit described above, and reimburse the employees in the unit, or former employees in the unit, for any monetary losses they may have suffered as a result of Armco's unilateral changes, with interest thereon to be

computed in the manner set forth in the section of this Decision entitled "The Remedy," and continue such payments until such time as Armco negotiates in good faith with OCAW or to impasse.

(c) Recognize and, upon request, bargain with OCAW as the exclusive collective-bargaining representative of the employees of Armco in the bargaining unit described above, and embody in a signed agreement any understanding which may be reached.

[ALJ 72]

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll and other records necessary to compute any "make whole" requirements to which it may be bound as a consequence of this order, and consistent with the section above entitled "The Remedy."

(e) Post at its Ashland, Kentucky coke plant the attached notice marked "Appendix A."[37] Copies of said notice on forms provided by the Regional Director for Region 9 after being duly signed by Armco or its representatives, shall be posted by Armco immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Armco to insure that said notices are not altered, defaced, or covered by any other material.

(f) Post at the same places and under the same conditions as set forth in (e) above, and as soon as they are

[37] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

forwarded by the Regional Director, copies of the Steelworkers' notice herein, marked "Appendix B."

(g) Notify the Regional Director for Region 9, in writing, within 20 days from the receipt of this Decision, what steps Respondent has taken to comply herewith.

B. Respondent Steelworkers its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Accepting recognition and giving effect to any collective bargaining agreement on behalf of Ashland coke plant employees of whom the Steelworkers does not represent a majority.

(b) Accepting and retaining moneys in the amounts equal to dues which have been deducted from the pay of Armco's Ashland coke plant employees.

(c) In any like or related manner restraining and coercing Armco's Ashland coke plant employees in the exercise of their rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Jointly and severally with Respondent Armco reimburse, with interest, employees, or former employees, at Armco's Ashland coke plant for any dues deducted since January 1, 1982.

[ALJ 73]

(b) Post in conspicuous places, in the Steelworkers Local 1865 business office, meeting halls, and places where notices to its members are customarily posted, copies of the attached notice marked "Appendix B."[38] Copies of said

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[38] See footnote 37 *supra.*

notice, to be furnished by the Regional Director for Region 9 shall, after being duly signed by an authorized representative of Respondent Steelworkers be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Furnish to the Regional Director signed copies of the aforesaid notice for posting by Respondent Armco at the Ashland coke plant in places where notices to employees are customarily posted. Copies of said notice, to be furnished by the Regional Director, shall after being signed by the Respondent, as indicated forthwith returned to the Regional Director for disposition by him.

(d) Notify the Regional Director for Region 9, in writing, within 20 days from the receipt of this Decision, what steps they have taken to comply herewith.

Dated, Washington, D.C. July 18, 1984

/s/
JOHN H. WEST
Administrative Law Judge

APPENDIX A

JD—244—84

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

AFTER A HEARING AT WHICH ALL SIDES HAD AN OPPORTUNITY TO PRESENT EVIDENCE AND STATE THEIR POSITIONS, THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT WE VIOLATED THE NATIONAL LABOR RELATIONS ACT, AND HAS ORDERED US TO POST THIS NOTICE.

WE WILL NOT recognize the **UNITED STEELWORKERS OF AMERICA, AFL-CIO**, and its **LOCAL UNION 1865 (Steelworkers)** as the exclusive representative of our Ashland, Kentucky coke plant employees.

WE WILL NOT give effect to any collective-bargaining agreement entered into between us and the above-described labor organization covering Ashland coke plant employees when said Union does not represent a majority of the employees or to any of its terms or conditions and refrain from any renewal or extension thereof without prejudice, however, to any wage or benefit granted to Ashland coke plant employees.

WE WILL NOT give effect to any dues checkoff authorization in favor of the Steelworkers.

WE WILL NOT refuse to recognize and bargain collectively with **OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO** (OCAW) as the exclusive collective-bargaining representative of the employees in the following unit:

All production and maintenance, all accounting clerical, office traffic clerical and stores clerical, plant

chemist, research technicians, employees of the company at Armco's Ashland, Kentucky [coke] plant, but excluding assistant plant controller, all employee relations department, plant buyer, store-keeper, draftsmen, and technicians of the plant engineering office, professional employees, guards and all supervisors as defined in the Labor-Management Relations Act, 1947.

WE WILL NOT make changes unilaterally, without notice to or bargaining with OCAW in the rates of pay, wages, hours and other terms and conditions of employment of the employees in the unit described above.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

APPENDIX B

JD—244—84

NOTICE TO EMPLOYEES AND MEMBERS

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

AFTER A HEARING AT WHICH ALL SIDES HAD AN OPPORTUNITY TO PRESENT EVIDENCE AND STATE THEIR POSITIONS, THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT WE VIOLATED THE NATIONAL LABOR RELATIONS ACT, AND HAS ORDERED US TO POST THIS NOTICE.

WE WILL NOT accept recognition or give effect to a collective-bargaining agreement on behalf of employees at the Ashland, Kentucky coke plant of **ARMCO, INC. EASTERN STEEL DIVISION, ASHLAND WORKS** (Armco), for whom we do not represent a majority.

WE WILL NOT accept and retain moneys in the amount equal to dues which have been deducted from the pay of Armco's Ashland coke plant employees.

WE WILL NOT in any like or related manner restrain and coerce Armco's Ashland coke plant employees in the exercise of their rights guaranteed under Section 7 of the Act.

WE WILL, jointly and severally with Armco reimburse, with interest, employees, or former employees, at Armco's Ashland coke plant for any dues deducted since January 1, 1982.

SA-141

UNITED STEELWORKERS OF AMERICA,
AFL-CIO LOCAL UNION 1865
(Labor Organization)

Dated ______ By ________________________________
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office.

Board's Office
Federal Office Bldg. Room 3003, 550 Main Street
Cincinnati, OH 45202 (Tel. No. (513) 684-3663)

APPENDIX C

JD—244—84

ORDER CORRECTING TRANSCRIPT

PAGE & LINE	NOW READS	SHOULD READ
29, line 1	"not"	"now"
32, line 22	"new"	"knew"
32, line 24	"precedence"	"precedents"
36, line 21	"was"	"as"
38, line 18	"swords points"	"at swords point"
99, line 23	"divised"	"devised"
100, line 5	"out"	"our"
116, line 19	"Mattox"	"Maddox"
171, line 12	"unitl"	"until"
273, line 23	"I invested"	"I'm vested"
312, line 4	"liability"	"viability"
325, line 19	"signaling out"	"singling out"
392, line 3	"coal"	"cold"
392, line 12	"coal"	"cold"
392, line 19	"coal"	"coil"
410, line 11	"dent"	"dint"
447, line 6	"tight"	"pipe"
460, line 4	"cust"	"cut"
501, line 16	"coal"	"cold"
518, line 24	(Answer Omitted)	"No"
518, line 25	"A."	"Q."
561, line 3	"voracity"	"veracity"
567, line 11	"stell"	"steel"
586, line 5	"were"	"we're"

594, line 7	"now withstand-ing"	"notwithstanding"
598, line 14	"until"	"on to"
613, line 22	"employees"	"employed"
616, line 4	"imply"	"apply"
633, line 6	"Mr. Landry"	"Mr. Horner"
677, line 14	"may be loose"	"maybe lose"
702, line 1	"intensive"	"intents and"
721, line 13	"Homer Lang"	"Homer Moore"
744, line 5	"my"	"me"
749, line 23	"principal"	"principle"
762, lines 3, 4	"coord. and blanket	"coordinated"
788, line 22	"or"	"are"
903, line 23	"B&A"	"BNA"
907, line 21	"Srith"	"Smith"
930, line 5	"bearest"	"barest"
936, line 15	"OSHA"	"OCAW"
937, line 2	"established"	"establish"
937, line 3	"hire"	"are"
937, line 11	"place"	"placed"
938, line 25	"show"	"shop"
939, line 17	"OCAW"	"OSHA"
941, line 3	"OSHA"	"OCAW"
941, line 11	"contractural"	"contractual"
944, line 5	"eminent"	"imminent"
949, line 25	"denomina-tions"	"the nominations"
959, line 7	"packed"	"pack"

(3) (2)

Nos. 87-1514 and 87-1719

In the Supreme Court of the United States

OCTOBER TERM, 1987

ARMCO, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

UNITED STEELWORKERS OF AMERICA, AFL-CIO AND ITS LOCAL 1865, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

CHARLES FRIED
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20 pp

QUESTION PRESENTED

Whether the National Labor Relations Board abused its discretion in finding that certain employees continued to comprise a separate appropriate bargaining unit and therefore could not properly be accreted into the steel works bargaining unit of the steel manufacturer that acquired the coke plant where they worked.

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v.

NATIONAL LABOR RELATIONS BOARD

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a)[1] is reported at 832 F.2d 357. The decision and order of the National Labor Relations Board (Supp. App. 2-11), together with the findings and recommendations of the administrative law judge (Supp. App. 12-141), are reported at 279 N.L.R.B. No. 143.

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[1] "Pet. App." refers to the appendix to the petition in No. 87-1514.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 1987. Timely petitions for rehearing and suggestions for rehearing en banc were denied on February 4, 1988. The petition for a writ of certiorari in No. 87-1514 was filed on March 12, 1988; the petition for a writ of certiorari in No. 87-1719 was filed on April 14, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. For approximately 35 years, Allied Chemical Corporation (Allied) produced coke in a plant in Ashland, Kentucky (Pet. App. 2a). The plant has a production capacity of approximately 2800 tons per day (*id.* at 3a). During 1981, however, it produced only about 500 tons per day and, as a consequence, nearly two thirds of its hourly employees, all of whom were represented by the Oil, Chemical, and Atomic Workers International Union, AFL-CIO (OCAW), were on layoff (*ibid.*). Almost all of the 500 tons of daily production was sold to petitioner Armco, Inc., which operated a nearby steel mill that used about 2800 tons of coke per day, the remainder of its coke needs being satisfied by other open market purchases (*id.* at 2a-3a). Armco's employees were represented by petitioners United Steelworkers of America, AFL-CIO, and its Local 1865 (Steelworkers) (*id.* at 3a).

In late 1981, Armco entered into negotiations with Allied to purchase the Ashland coke plant (Pet. App. 3a). After a tentative agreement was reached, Armco notified the Steelworkers and the OCAW that it intended to retain Allied's coke plant employees, to treat them as an accretion to the existing Steelworkers unit at the steel mill, and to apply the extant Steelworkers contract to them (*id.* at

3a-4a). Steelworkers, but not OCAW, ultimately agreed both to this arrangement and to have the seniority of Allied's employees run from the effective date of Armco's acquisition of the coke plant (*id.* at 4a-5a).

Armco then began conducting orientation meetings for Allied's employees, which local officers of Steelworkers attended (Pet. App. 4a; Supp. App. 72-73). At these meetings, Armco officials distributed Steelworkers' dues checkoff and authorization cards and, together with Steelworkers officials, told the employees that they risked discharge if they refused to sign the checkoff authorizations (Pet. App. 4a). The employees signed the checkoff authorizations, but objected to representation by Steelworkers (*ibid.*).

Armco's purchase of the coke plant became effective on December 31, 1981, and it commenced operations on January 2, 1982, using the same machinery, equipment, and production methods that Allied had previously used at the plant (Pet. App. 4a-5a). All of the hourly employees employed at the plant were former employees of Allied; and a substantial majority of the supervisors employed there were former Allied supervisors (Supp. App. 71). The superintendent of the plant had been its manager under Allied, and Armco assigned him responsibilities similar to those assigned to other Armco department heads (Supp. App. 91 & n.26). The employees performed essentially the same work for Armco as they had performed for Allied (Supp. App. 94); indeed, Armco decided to retain the existing work force at the coke plant precisely because its own employees were not trained to operate a coke oven (Supp. App. 53-54).

Armco treated the coke plant and the steel mill as distinct components of its steel manufacturing operations (Pet. App. 10a-11a). It used different job classifications at the two facilities (Supp. App. 93). It declined to transfer

employees between them (Supp. App. 91). Indeed, of the 2700 steel mill employees, 550 of whom were maintenance employees, only 24 employees—all maintenance employees—ever had any on-the-job contact with the coke plant's employees; and the same 24 employees were always assigned to perform the maintenance work at the coke plant in order to comply with OSHA regulations relating to carcinogenic conditions there (Supp. App. 93-94, 105-106, 117). Finally, Armco had the coke plant employees punch a separate time clock and use a separate telephone line and credit union; and the coke plant was approximately five miles fom the steel mill (Supp. App. 121, 122).

2. The coke plant employees remained unhappy with Armco's decision to apply the Steelworkers collective bargaining agreement to them (Pet. App. 5a). Accordingly, in April 1982, they urged OCAW to demand that Armco bargain with it as their representative (*ibid.*). When Armco refused to do so, OCAW filed unfair labor practices charges against Armco and Steelworkers with the National Labor Relations Board (*id.* at 6a).

After a hearing, an administrative law judge (ALJ) held that Armco had violated Section 8(a)(1), (2), and (3) of the National Labor Relations Act (NLRA or the Act) (29 U.S.C. 158(a)(1), (2), and (3)) by recognizing and entering into a contract with Steelworkers covering the coke plant employees, a majority of whom Steelworkers did not represent, and that Steelworkers had violated Section 8(b)(1)(A) and (2) of the Act (29 U.S.C. 158(b)(1)(A) and (2)) by accepting recognition and entering into a contract with Armco in these circumstances (Supp. App. 130-131). In addition, the ALJ held that Armco and Steelworkers had violated the above sections of the Act by requiring the coke plant employees, as a condition of their employment, to execute Steelworkers' dues checkoff and authorization

cards (Supp. App. 131). Finally, the ALJ held that Armco was a successor-employer with respect to the coke plant; that Armco was accordingly obligated to bargain with OCAW as the exclusive representative of the coke plant employees; and that Armco had violated Section 8(a)(1) and (5) of the Act (29 U.S.C. 158(a)(1) and (5)) by refusing to bargain with OCAW and by unilaterally changing the terms and conditions of employment of the coke plant employees (Supp. App. 131).

The ALJ rejected (Supp. App. 99-123) petitioners' contention that the coke plant employees were an accretion to the steel works unit and thus had not maintained their status as a separate appropriate bargaining unit. The ALJ noted that the accretion of employees into an existing bargaining unit is appropriate only " 'when such community of interest exists among the entire group that the additional employees have no separate unit identity' " (Supp. App. 103 (citation omitted)). The ALJ then found (Supp. App. 121-122) that the coke plant employees had in fact maintained a separate group identity after Armco took over the coke plant's operations, noting (*ibid.* (footnote omitted)) that

> [b]y virtue of their separate existence, separate location, and separate collective-bargaining history before the purchase, coke facility employees enjoyed a community of interest separate from the Works. In my opinion, in view of the functional distinctness, different skills and training, different work environment, geographical separation, general lack of personal contact with works employees, and partial autonomy, coke plant employees continue to have a community of interest separate from the Works employees. Their separate community of interest has not been submerged into any broader community of interest because there is no high degree of integration of the two * * *.

The ALJ also rejected Armco's contention that a separate unit was inappropriate here because "the coke facility has become an intimate part of Armco's continuous production of steel" (Supp. App. 119). He explained (Supp. App. 120-121 (footnotes omitted)) that:

> While * * * the coke moves directly from the coke facility to the blast furnace, the coke, like the iron ore and limestone, is nothing more than a material used in steelmaking. The continuous process does not begin at the coke facility but rather at the blast furnace. Consequently, while some coke facilities may historically have become part of integrated steel works, some exist, as Allied did, separate from the steel mill and they are in effect nothing more than suppliers of a material used in steelmaking. Coke may be an essential ingredient in steelmaking but the coke facility and its employees are not an essential part of the continuous production process. Admittedly Armco at Ashland has become dependent on a supply of coke from the facility but that dependence does not make the facility part of the continuous process. What it does do is allow Armco to avoid having to stock pile large amounts of coke and assures the quality of coke Armco[] uses. But this * * * does not preclude the employees in the coke facility from being a separate appropriate unit. *Mallinckrodt Chemical Works* [162 N.L.R.B. 387 (1966)]. What were separate units do not automatically merge where integration is lacking.

3. The Board, with Chairman Dotson dissenting in part, adopted the findings and recommendations of the ALJ and ordered Armco and Steelworkers (a) to cease and desist from applying the Steelworkers contract to the coke plant employees and (b) to reimburse the coke plant

employees for the dues that they were illegally required to pay to Steelworkers (Supp. App. 2-11). The Board further ordered Armco, upon request by OCAW, to bargain with it as the exclusive representative of the coke plant employees; to restore the terms and conditions of employment that existed prior to Armco's unilateral changes; and to reimburse the employees for any monetary losses suffered as a result of those unilateral changes (Supp. App. 131-133).

4. The court of appeals, with one exception not pertinent here,[2] affirmed the Board's decision and enforced its order (Pet. App. 1a-16a). It noted (*id.* at 9a (citation omitted)) that, "[t]o determine whether two groups of employees should be included in the same bargaining unit, the Board applies a 'community of interests' test: the two groups must share a 'community of interests sufficient to justify their mutual inclusion in a single bargaining unit.' " The court then noted (*ibid.*) that "[t]his test consists of several factors: (1) similarity in skills, interests, duties, and working conditions; (2) functional integration of the plant, including interchange and contact among the employees; (3) the employer's organizational and supervisory structure; (4) the bargaining history; and (5) the extent of union organization among the employees." And it added (*id.* at 9a-10a) that the Board's "ultimate determination as to the appropriate unit must be upheld unless it is arbitrary, unreasonable, or an abuse of discretion." The court concluded (*id.* at 10a) that "the Board's finding that the coke workers constituted a separate, appropriate

[2] The court refused to require Armco to make the coke plant employees whole for the earnings that they lost due to Armco's unlawful conduct; rather, it remanded this aspect of the case to the Board for further proceedings (Pet. App. 15a-16a). No issue concerning this aspect of the court's judgment is raised here.

bargaining unit was not arbitrary, not unreasonable, and not an abuse of its discretion."

In reaching this conclusion, the court placed special emphasis on "[t]he administrative law judge's conclusion that the two employee groups had dissimilar skills, duties, and working conditions" (Pet. App. 10a). The court found that this conclusion was "clearly supported by substantial evidence" (*ibid.*), stressing that "[a]ll parties have acknowledged that the coke workers possess different skills, and that they work in a more hazardous environment than most steelworkers" (*ibid.*). The court was not "persuaded" by petitioners' contention that the two bargaining units were "functional[ly] integrat[ed]" (*ibid.*), noting (*id.* at 11a) that "the coke workers unit was an independent, separate plant with a long bargaining history and a long union relationship," that the acquisition of the coke plant by Armco had changed nothing about the plant's operations or the composition and tasks of the workforce, and that there was no employee interchange between the plants. The court similarly rejected (*id.* at 12a) petitioners' contention that the pattern of bargaining in the steel industry precluded a finding that separate bargaining units were appropriate, stating that there is no case "in which a previously-independent coke plant has been acquired and the employees accreted to a pre-existing steelworkers bargaining unit." Finally, it discounted the fact that Armco had demonstrated uniformity in wages, hours, and terms of employment between the coke workers and the other Armco employees (*ibid.*), reasoning that "the uniformity * * * is the result of the disputed conduct: the application of the Steelworkers' contract to the coke plant employees" (*id.* at 13a).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is unwarranted.

1. Section 9(b) of the Act (29 U.S.C. 159(b)) empowers the Board to decide "in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by [the Act], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof * * *." In this case, the Board found, as a factual matter, that the same employees continued to perform the same work at the coke plant; that the coke plant employees used the same machinery and production methods and worked under the same supervisors; that employee interchange between the coke plant and the steel mill was practically nonexistent; that there was virtually no on-the-job contact between coke plant employees and other Armco employees; and that the skills, training, and job classifications of the coke plant employees were significantly different from those of the steel mill employees. In view of the "functional distinctness, different skills and training, different work environment, geographic separation, general lack of personal contact with works employees, and partial autonomy" of the coke plant employees (Supp. App. 121-122 (footnote omitted)), it was entirely reasonable for the Board to conclude that the coke plant employees continue to have a separate group identity and that they could not be accreted into the steel works unit.[3]

[3] Petitioners do not dispute that, if the coke plant employees remained a separate appropriate unit, the Board would be justified in treating Armco as a successor to Allied's bargaining obligation. See *Fall River Dyeing & Finishing Corp.* v. *NLRB*, No. 85-1208 (June 1, 1987), slip op. 15-16; *NLRB* v. *Burns Int'l Security Services, Inc.*,

The court below accordingly had no choice but to affirm the Board's decison. See *South Prairie Constr. Co.* v. *Local 627, Int'l Union of Operating Engineers,* 425 U.S. 800, 805 (1976); *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491 (1947).

2. Petitioners nevertheless contend (Armco Pet. 7-13; Steelworkers Pet. 6-8) that the court below erred in approving the Board's refusal to treat the coke plant operations as part of a continuous manufacturing process and that the decision below thus conflicts with decisions of the Fourth and Seventh Circuits. This contention raises a factbound issue that does not warrant review by this Court and, in any event, is meritless.

The court below was plainly justified in upholding the Board's finding that the coke plant was not part of a continuous process of producing steel. As the ALJ stated (Supp. App. 120-121 (footnote omitted)), in this steel manufacturing system, "[t]he continuous process does not begin at the coke facility but rather at the blast furnace." Thus, as the ALJ further noted (*ibid.*), "while some coke facilities may historically have become part of integrated steel works, some exist, as Allied did, separate from the steel mill and they are in effect nothing more than suppliers of a material used in steelmaking." And, finally, as the ALJ also noted (*ibid.* (footnote omitted)), while Armco's acquisition of the coke plant may have increased its dependence on a supply of coke from that facility, it did not make the coke facility and its employees "an essential part of the continuous production process" of steel—at least not to any greater extent than they were at

406 U.S. 272, 280 n.4 (1972). Nor do petitioners dispute that employees who constitute a separate appropriate unit cannot be treated as an accretion to another unit and be forced to accept that unit's bargaining representative without a Board-supervised election. See *Melbet Jewelry Co.*, 180 N.L.R.B. 107, 110 (1969); accord *Meijer, Inc.* v. *NLRB*, 564 F.2d 737, 740, 742-743 (6th Cir. 1977); *Penn Traffic Co.* v. *NLRB*, 546 F.2d 677 (6th Cir. 1976).

the time Allied owned the plant. In short, the steel and coke production processes are not integrated, and separate bargaining units are appropriate. See *Mallinckrodt Chemical Works*, 162 N.L.R.B. 387 (1966).[4]

The decision of the Fourth Circuit in *NLRB* v. *Harry T. Campbell Sons' Corp.*, 407 F.2d 969 (1969), is not to the contrary. In that case, the Fourth Circuit held that a calcite operation was integrated with other operations of the employer and therefore that separate units were inappropriate. But the calcite operation at issue there was within 35 feet of the employer's other operations. Moreover, the calcite operation's employees and other employees regularly worked together; and job classifications were uniform throughout the facility. In short, there

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[4] Petitioners err in suggesting (Armco Pet. 9; Steelworkers Pet. 6) that the Board has a history of finding plant-wide units to be appropriate in steel and similar industries. To be sure, the Board at one time had a special rule for steel and three other industries, under which integration of operations and the bargaining pattern in the industries were deemed to compel the conclusion that only an overall bargaining unit was appropriate. See *In re National Tube Co.*, 76 N.L.R.B. 1199, 1207 (1948) (steel); *In re Permanente Metals Corp.*, 89 N.L.R.B. 804, 811 (1950) (aluminum industry); *In re Weyerhauser Timber Co.*, 87 N.L.R.B. 1076, 1082 (1949) (lumber industry); *In re Corn Products Refining Co.*, 80 N.L.R.B. 362, 364-365 (1948) (wet milling-industry). In *Mallinckrodt Chemical Works*, 162 N.L.R.B. 387 (1966), however, the Board determined that the "distinctions between industries" in the existing case law was "arbitrary" (*id.* at 396), and that it "inten[ded] to free [itself] from the restrictive effect of rigid and inflexible rules in making [its] unit determinations" (*id.* at 398). The Board therefore announced that future unit determinations would be made "only after * * * weighing * * * all relevant factors on a case-by-case basis," and that it would "apply the same principles and standards to all industries" (*ibid.*); *National Tube* and its progeny were overruled to the extent that they established a per se rule that only overall units were appropriate in certain industries—including steel.

was "an extraordinary degree of integration and interdependence" (*id.* at 977-978). The opposite is true here.

Nor is the decision of the Seventh Circuit in *Continental Web Press, Inc.* v. *NLRB*, 742 F.2d 1087 (1984), inconsistent with the decision here. In *Continental Web Press*, the court found that "preparation and printing are successive stages in a single lithographic production process" (*id.* at 1091). The court based this finding on the fact that the two groups of employees were performing successive stages of a single operation, had similar skills, did similar work, received similar pay, and worked in adjacent areas of the same plant (*ibid.*). It thus remanded the case to the Board for further explanation of the decision to treat the pressmen and preparatory employees as comprising two identifiable groups (*id.* at 1092-1094). Here, on distinguishable facts, the Board has already provided such an explanation.

Petitioners suggest (Armco Pet. 10, 13; Steelworkers Pet. 7) that the decisions of the Fourth and Seventh Circuits turned on the ability of one group of striking employees to shut down an entire plant and that the same is true here. The decisions of those cases did not, however, turn on the fact to which petitioners point. The courts in those cases did note that one reason employees in an integrated production process are placed in a single bargaining unit is so that one group of employees in the operation cannot deprive the other employees of work by causing the operation to shut down. See *NLRB* v. *Harry T. Campbell Sons' Corp.*, 407 F.2d at 979; *Continental Web Press, Inc.* v. *NLRB*, 742 F.2d at 1090. But the courts did not suggest that employee groups must be combined wherever there is a danger that a strike by one group of employees could shut down an entire plant and thus deprive another group of employees of work, a possibility that exists whenever there is more than one unit established in an industrial

plant – whether its production processes are continuous or not. Rather, the courts in those cases relied on the traditional "community of interests" test in deciding that separate bargaining units were not appropriate. See *NLRB* v. *Harry T. Campbell Sons' Corp.*, 407 F.2d at 977-978; *Continental Web Press, Inc.* v. *NLRB*, 742 F.2d at 1091-1094. In any event, the record in this case does not support the suggestion that the coke plant employees could shut down Armco's steel mill operations. Prior to the purchase of the Ashland plant, Armco satisfied most of its coke needs through purchases on the open market. There is no reason to believe that it could not do so again.[5]

3. Petitioners next contend (Armco Pet. 12-13, 15-16; Steelworkers Pet. 8-11) that the court below erred in approving the Board's consideration of past bargaining history in its unit determination and that, as a consequence, its decision conflicts with the decision of the Seventh Circuit in *NLRB* v. *Indianapolis Mack Sales & Service, Inc.*, 802 F.2d 280 (1986). This contention is also without merit.

First of all, petitioner Steelworkers errs in suggesting (Pet. 8-11) that the Board and the court below subordinated the "community of interests" analysis to consideration of the past bargaining history of the coke workers. The Board merely considered whether the coke plant employees' previous status as a separate appropriate bargaining unit had been negated by their integration into the larger Armco workforce; it concluded, based on a

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[5] The cases that petitioners cite (Armco Pet. 13 n.10; Steelworkers Pet. 7 n.5) for the proposition that separate units are disfavored where a work stoppage is likely to have an immediate and adverse impact on production involve situations where the adverse impact flows from the integration of the operations, and not, as here, from the resulting reduced supply of a commodity used in the production process.

variety of factors, that Armco's purchase of the plant had not done so. See Supp. App. 99-123. The court below did the same. While it stated that the coke employees' "long bargaining history and * * * long union relationship [with OCAW] * * * alone suggests the appropriateness of a separate bargaining unit" (Pet. App. 11a), it did not in fact rely on that factor alone; rather, it looked to several factors—including the similarity of the employees' skills, interests, duties, and working conditions; the functional integration of the plants; and the employer's organizational and supervisory structure—and upheld the Board's multifactored analysis. See *id.* at 9a-13a. The "community of interest" analysis plainly was not subordinated to past bargaining history.

Petitioners are similarly mistaken in suggesting (Armco Pet. 15-16; Steelworkers Pet. 9-10) that past bargaining history is irrelevant to the determination of a separate appropriate unit in a successorship situation. Athough *NLRB* v. *Burns Int'l Security Services, Inc.*, 406 U.S. 272, 280 (1972), holds that a purchaser may make operational changes of such magnitude as to render a pre-existing unit inappropriate, the Court in that case also cited with approval (*id.* at 281) the Fifth Circuit's decision in *NLRB* v. *Zayre Corp.*, 424 F.2d 1159, 1165 (1970), which expressly held that bargaining history is a relevant factor for consideration in a successorship context and that the successor has the burden of demonstrating that its changes have destroyed the separate identity of the prior bargaining unit. Indeed, last Term, in *Fall River Dyeing & Finishing Corp.* v. *NLRB*, No. 85-1208 (June 1, 1987), slip op. 15, this Court made clear that, in a successorship situation, the continuing appropriateness of previous representation is to be assessed from "the employees' perspective" and must be "based upon the totality of the circumstances," which obviously includes past bargaining history.

The Seventh Circuit's decision in *NLRB* v. *Indianapolis Mack Sales & Service, Inc., supra*, does not suggest that past bargaining history cannot be considered in such situations. To be sure, the court there held that past bargaining history cannot be the sole basis upon which a separate unit determination rests. See 802 F.2d at 285-286. But the court also held that past bargaining history is a factor to be considered in determining whether a newly acquired unit remains appropriate. See *ibid.* That is precisely the approach that the Board and the court below took in this case.

4. Petitioner Armco also errs in asserting (Pet. 13-16) that "economic factors" – more particulaly, the employer's unified "economic mission" after acquisition – are central to the "community of interest" analysis. To give decisive weight to these factors would preclude less than plant-wide units from being found appropriate in any context, not just in the successorship situation. That result would conflict with Section 9(b) of the Act, which permits the Board to establish smaller than plant-wide units in order that employees will have the fullest freedom to select a representative of their choice.

5. Finally, petitioners cry "wolf" in suggesting (Armco Pet. 13-18; Steelworkers Pet. 11-12) that the decision below will unduly discourage acquisition of failing businesses and deter successor employers from retaining their predecessors' employees. Where it has a legitimate business reason,[6] a successor-employer may decide not to retain an existing workforce and, instead, to hire and train an entirely new one. But where it chooses to retain the pre-

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[6] Under the labor laws, a successor employer may not, of course, refuse to hire the predecessor's employees merely to avoid recognizing their bargaining representative. See *NLRB* v. *Burns Int'l Security Services, Inc.*, 406 U.S. at 279-280 & n.5; *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249, 262 n.8 (1974).

existing work force (and to avoid the expense associated with hiring and training a new one), the successor-employer is not free to "thwart[]" the employees' "legitimate expectations in continued representation by their union" merely because it fears that separate representation will give those employees undue economic leverage. See *Fall River Dyeing & Finishing Corp.* v. *NLRB*, slip op. 15. On the contrary, separate appropriate representation is a right granted those employees by the NLRA, and the employer must respect it; as this Court has said, industrial strife is more likely to result from frustration of the "legitimate expectations" of the employees in continued representation than from any leverage that may flow from recognizing their right to separate representation. See *ibid.*; accord *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 184 (1973).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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Nos. 87-1514 and 87-1719

IN THE

Supreme Court of the United States

October Term, 1987

ARMCO, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD

UNITED STEELWORKERS OF AMERICA, AFL-CIO
AND ITS LOCAL 1865, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD

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QUESTIONS PRESENTED

1. Was the National Labor Relations Board ("N.L.R.B.", "Board") decision that the coke plant employees comprised a bargaining unit separate and distinct from the steel mill workers arbitrary and capricious?
2. Was the above-mentioned decision an abuse of discretion by the N.L.R.B.?

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UNITED STEELWORKERS OF AMERICA, AFL-CIO AND ITS LOCAL 1865, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD

BRIEF OF THE OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 832 F.2d 357. Copies of the Opinion of the National Labor Relations Board (279 N.L.R.B. No. 143, May 30, 1986) and the Opinion of the Administrative Law Judge, have been lodged with the Clerk of this Court by way of a joint Supplemental Appendix filed by both Petitioners.

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1987. Petitions for Rehearing were denied on February 4, 1988. A Petition for Extension of Time to Respond

to the Petitions for Writ of Certiorari was filed both by the N.L.R.B. and the OCAW with this Court and an extension until May 19, 1988 was granted. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Allied Chemical Corporation was engaged in the production of coke and its by-products for 35 years in the Ashland, Kentucky area. From 1952 through 1981, its workers were represented by the Oil, Chemical and Atomic workers International Union, Local 3-523.[1]

Armco owns a steel mill in Ashland, Kentucky, and its 3700 workers are represented by the United Steelworkers of America ("USWA", "Steelworkers"). Although both facilities are located in Ashland, Kentucky, there is a distance of several miles between the two plants.

The two companies transacted business with each other, with Armco purchasing approximately 500 tons of coke per day from Allied, a total which represented almost all of Allied's daily production. Because the coke plant had a daily output capacity of 2800 tons, most of its approximately 400 workers were on layoff status during 1981. Allied desired to get out of the coke industry, therefore, it entered into negotiations with Armco for the sale for the Ashland coke facility. The sales was consummated on December 31, 1981, with Armco buying the coke plant for a price of $100,000,000.

In the steel industry, some, but certainly not all, manufacturers also own coke plants adjacent to or near their blast furnaces. The coke facility here is located several miles from the blast furnaces. Coke facilities require a work force that has specialized skills which are different from those possessed by

[1] The Unions representation ended on 12/31/81 even though it had a collective bargaining agreement with Allied effective through May 14, 1982. The termination of this representation will be discussed below.

steel mill employees. So, although Armco had several hundred workers on layoff status at the steel mill, it wished to retain Allied's competent, stable, well-trained and highly skilled workforce because of the economic and practical benefits that such a move would bestow upon Armco's operations.

During negotiations, Armco told Allied that it would hire the entire workforce from the coke plant and would recall laid-off coke plant workers in accordance with their rights under the OCAW contract. Armco would refuse, however, to either recognize or negotiate with OCAW as bargaining agent for these workers, stating that it wished to bring the workers in under the Steelworkers' contract.

Talks were held between OCAW and USWA about this representational issue. Since both OCAW and USWA are members of the AFL-CIO, OCAW President Robert Goss sought a cooperative effort between the Unions to determine whether they could agree on a plan that would be in the coke plant workers best interest; a plan in which Armco would hire these workers with seniority, pensions, and other benefits intact. If this arrangement could be made and if OCAW Local 3-523's members agreed to USWA representation, Goss said he would consider releasing them subject to OCAW internal procedures for transferring jurisdiction to another international union. The statement by Goss that OCAW would consider releasing its members by no means meant that such release was either approved or imminent. None of the conditions mentioned by Goss was ever met.

Armco and USWA began to negotiate on December 2, 1981 on an agreement that would cover the coke plant employees. These negotiations produced an agreement which assigned the coke plant employees a seniority date of December 31, 1981 for purposes of plant-wide job rights.[2] The agreement effectively

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[2] The coke plant employees retained their Allied seniority for purposes of relative seniority within their own group, that is, for vacation and shift assignments. In that respect, nothing changed in their working conditions after the takeover.

prohibited any exchange of jobs between steel mill and coke plant employees. Thus, the coke plant employees became an entirely separate group not only because of a different community of interests but also because of a physical separation. No OCAW representative was invited to participate in the negotiations that led to the Armco-Steelworkers Agreement.

Because none of its objectives had been met in the Armco-Steelworkers Agreement, OCAW emphatically declined to sign the Memorandum of Understanding reached by Armco and the Steelworkers when the USWA presented it to OCAW. President Goss sought the assistance of the Steelworker's International President Lloyd McBride but when that assistance was not forthcoming, friendly communications between the two unions ended.

OCAW was advised by both Allied and Armco that it would be unwise to assert OCAW's bargaining rights, that Allied might shut the plant down instead of selling it to Armco and that the Armco-Steelworkers Agreement was "the only show in town" if the coke plant workers were to keep their jobs.

On December 19, Armco, Allied, and OCAW's local representatives met. Armco Official Ed Maddox explained terms of the transfer, which included a guarantee of jobs for the present workforce and eventual recall of laid-off workers. "That is," said Maddox, "unless someone gives us a reason not to." OCAW understood that the "reason not to" would be OCAW's insistence on continuing as the coke plant's bargaining representative. The ALJ, the Board, and the Sixth Circuit found that further OCAW demands would have been futile and the OCAW reasonably feared its members would have been futile and that OCAW reasonably feared its members would lose their jobs if the Union insisted on its legal prerogatives.

Armco took over the coke facility on December 31, 1981. At an indoctrination meeting for its employees on January 2, 1982, the coke plant employees were given membership applications and dues check-off authorization cards for the USWA

and were required to sign these as conditions of employment.[3] Although both President Goss and OCAW Local Representative Kenneth McKeand initially objected to this requirement, they eventually told the coke workers to sign the cards rather than risk losing their jobs. At no time, however, did OCAW unconditionally release the employees to the Steelworkers, and at no time did the workers vote to be represented by the Steelworkers.

The OCAW thereafter sought to maintain its jurisdiction over the coke plant workers. After consulting with its legal staff, the OCAW decided to pursue litigation instead of filing charges pursuant to Article XX of the AFL-CIO Constitution. This litigation has exhausted all administrative procedures at the N.L.R.B. and progressed to the U.S. Court of Appeals for the Sixth Circuit, where the Court upheld N.L.R.B. findings favorable to OCAW. The OCAW has pursued this course of action vigorously and at no time has the Union waived its right to act as bargaining agent for the coke plant employees.

REASONS TO DENY THE WRIT

I. THE DETERMINATION THAT MULTIPLE BARGAINING UNITS ARE NECESSARY FOR A SINGLE EMPLOYER DOES NOT CONFLICT WITH THE PRECEDENT ESTABLISHED BY THE N.L.R.B. THE BOARD HAS APPROVED SEPARATE BARGAINING UNITS

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[3] Armco's Ed Maddox admitted that he had given an Affidavit to the National Labor Relations Board stating that signing the cards was required (Tr. 94). Several employees testified that questions were raised by the employees about the cards at several orientation meetings, and that the Company's uniform response was, "if you work for Armco, you have to sign the card." (Tr. 378; 131; 134; 377; 1033). Moreover, every employee did sign. (Tr. 94). As Darrell Clay testified, "I needed the job, and my understanding was that that was the only way that I could be hired - was to sign the card." (Tr. 165).

IN HIGHLY INTEGRATED INDUSTRIES IN THE PAST.

The Board has carved out separate bargaining units in highly integrated manufacturing processes in the past. This determination ws approved by the court of appeals in *N.L.R.B. v. Metal Container Corp.*, 660 F.2d 1309 (8th Cir. 1981). The court held that a separate bargaining unit for four electricians was appropriate despite the highly integrated nature of the Company's two-piece can manufacturing process. Although there were a total of 110 manufacturing employees in the plant, the court held that the four electricians had a community of interests that was separate and district from that of the other workers. Past industry practice was also found irrelevant in that determination. Seventy-one out of seventy-two plants that were previously organized in that industry had "wall-to-wall" bargaining units. Nevertheless, the Board and the court found that the controlling factor was whether or not the workers had a similar community of interest.

The Board also found that separate bargaining units were appropriate, a decision affirmed in *Hamilton Test Systems v. N.L.R.B.*, 743 F.2d 136 (2nd Cir. 1984), despite an outcry from the company that this would subject it to piecemeal unionization. Community of interests was once again the overriding factor in the Board's decision. In the present case, the Board found that the coke workers are involved in a different operation than the steel mill workers. The Sixth Circuit upheld this determination. Even the Steelworkers admit that the coke industry and the steel industry are, in fact, different industries.[4]

The two cases cited by Petitioner, concerning single bargaining units for workers in a highly integrated industry, are factually distinct from the present case. *Continental Webb Press, Inc. v. N.L.R.B.*, 742 F.2d 1087 (7th Cir. 1984), involved pressmen

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[4] Steelworkers Petition for Certiorari, Questions Presented, Question 2, last line, p. i.

and preparatory employees that performed many of the same duties and had a high degree of interaction. The workers in *N.L.R.B. v. Harry T. Campbell Sons' Corp.*, 407 F.2d 969 (4th Cir. 1969), had a higher degree of interaction than in the current case, performed some of the same tasks and worked in buildings and quarries that were located next to one another on the company's compound.

The case at hand differs from both of those mentioned above because there is geographical distance between the two plants, different skills are involved and the coke workers face different hazards than the steel mill workers do. In short, the Board found based upon the facts of the case at bar that the coke facility workers had a different community of interests than that workers at the steel mill.

The Sixth Circuit upheld the Board's ruling because it was not arbitrary and capricious and there was no abuse of discretion since the decision was based on substantial evidence in the record. The present situation is simply much different than the facts presented in either *Harry T. Campbell* or *Continental Webb Press.* The Board saw this and made a decision that was justified and well within its discretion. *See, also, South Prairie Construction Co. v. Local 627, International Union of Operating Engineers,* 425 U.S. 800 (1976) (the Court made it clear that the Board's decision concerning the selecton of an appropriate bargaining unit lies within the Board's discretion and should be given deference). Since the facts of the case at bar differ from those of the cases cited by Petitioners, no actual conflict among the circuit courts exists. Each circuit has applied the same principles of law, only to differing sets of facts. Thus, granting the Writ requested would be inappropriate.

Although functional integration of an operation is one factor to be considered in determining the appropriate bargaining unit, it is not the sole factor. Among other factors to consider are geographical proximity, degree of interchange among employees of different departments, similarity of working

conditions, skills and functions, and collective bargaining history.[5]

The court in *N.L.R.B. v. Indianapolis Mack Sales and Service, Inc.*, 802 F.2d 280 (7th Cir. 1986), cited by Petitioners, themselves, held that the Board erred when it considered only one of the factors - past bargaining history - in making a determination about an appropriate bargaining unit. Similarly, integration of the manufacturing process is only one of the factors to be considered. The ALJ and the Board, however, examined the integration of operations as well as the degree of interchange among employees, geographical proximity between the two plants, similarity of working conditions, differing skills and functions required of the workers in the two facilities, centralized administrative control and past bargaining history and determined that the coke plant workers were an appropriate bargaining unit and had not been accreted into Armco's existing facility. Petitioners' Supplemental Appendix (P.S.A.) pp. 120-122. The Sixth Circuit in upholding the Board's decision stated that there had been no abuse of discretion by the N.L.R.B. and that its decision was based on substantial evidence on the record. Absent an arbitrary and capricious decision where there is no substantial evidence on the record, the Board's decision should be granted deference based on its broad experience in these matters. *See, e.g. Beth Israel Hospital v. N.L.R.B.*, 688 F.2d 697 (10th Cir. 1982), *cert. denied,* 459 U.S. 1025 (1982).

Although the Board may have found accretion in some of the other steel mill cases that it has heard, it has broad discretion in defining bargaining units and this Court has recognized the need for flexibility in individual cases. *N.L.R.B. v. Hearst Publications,* 322 U.S. 111 (1944). This Court has opined that

[5] *See, N.L.R.B. v. Foodland, Inc.*, 744 F.2d 735 (10th Cir. 1984), *E. I. DuPont de Nemours & Co.*, 162 N.L.R.B. 413 (1966), *Atlantic Richfield Co.*,231 N.L.R.B. 31 (1977); *Matlack, Inc.* 278 N.L.R.B. No. 36 (1986).

". . . the selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision 'if not final, is rarely to be disturbed.' " *South Prairie Construction Company v. Local 627, International Union of Operating Engineers,* 425 U.S. 800, 805 (1976), citing, *Packard Motor Company v. N.L.R.B.,* 330 U.S. 485 (1947).

The Sixth Circuit found no abuse of discretion by the Board and the decision was based on substantial evidence in the record. Absent findings that the decision was arbitary and capricious, the decision below should stand and this case should not be reviewed.

II. THE BOARD AND THE COURT OF APPEALS CONSIDERED A NUMBER OF FACTORS IN MAKING THEIR DETERMINATION THAT THE COKE PLANT WORKERS COMPRISE AN APPROPRIATE BARGAINING UNIT. THIS DECISION IS NOT IN CONFLICT WITH THAT OF THE SEVENTH CIRCUIT.

Although the court of appeals does say that past bargaining history alone is suggestive of a separate bargaining unit, it discusses other factors comprising community of interest and gives weight to them. The court considered the similarly of skills, lack of employee interaction and integration of the manufacturing process in its discussion. the Petitioners suggest that the court did not give adequate consideration to the integration of the process. However, the court did consider the issue and agree with the Board that the process was not highly integrated. *Armco, Inc. v. N.L.R.B., supra,* pp. 363-364.

The process of producing coke was separate from that of producing steel and some of the coke was indeed stockpiled for future use. P.S.A., pp. 119-120. The continuous process does not begin at the coke facility but rather at the blast furnace. *Id.,* p. 120. The Administrative Law Judge found that the coke facility was nothing more than a supplier to the steel mill.

Id. Based on factors that it has used many times in the past, the Board made a decision about the appropriate bargaining unit that was consistent with rulings it had made previously. The Sixth Circuit applied the appropriate standard of judicial review and upheld the Board's decision. There is no need for further review. Since the case at bar differs from the cases cited by Petitioners, no actual conflict among the circuit courts exists. Each Circuit has applied the same principles of law, only to differing sets of factors. Thus, granting the Writ requested would be inappropriate.

In *N.L.R.B. v. Indianapolis Mack Sales, supra,* the court held that the Board should not consider past bargaining history alone; rather, the Board should consider a wide range of factors that comprise the community of interests. The ALJ, the Board and the Court of Appeals in this matter considered these factors in rendering their decisions. This is consistent with the holding in *Indianapolis Mack Sales, supra,* p. 363. Thus, there is no conflict between circuit courts which this Court must clear up.

III. ECONOMIC FACTORS, WHILE DUE SOME CONSIDERATION, ARE NOT THE SOLE DETERMINANT OF THE APPROPRIATE BARGAINING UNIT.

The court below recognized that there were some changed economic circumstances after Armco purchased the coke facility in that, primarily, production had increased and Armco now had a greater number of employees. *Armco, Inc. v. N.L.R.B., supra.* The coke plant and the steel mill may have a united economic mission because they are both part of the same company and, generally, if the corporation flourishes, its distinct parts will also benefit. Interest in seeing the corporation show a profit, however, does not equate to workers having the same community of interests in their individual segments of the corporation. Workers in different parts of the corporation have different skills and face different working conditions.

In examining the components of "community of interests", the Board found that the coke facility workers face environmental hazards differing from those faced by steel mill workers and that the skills needed for job performance were different for the respective groups. P.S.A., pp. 117-121. The Board held that separate bargaining units were necessary to address these concerns. The Board's decision recognizes that workers in different departments of the same corporation can and do have different skills and face different obstacles in their effort to assist in keeping a company economically viable. The Sixth Circuit upheld this ruling finding that the decision was based on substantial evidence on the record and that there was no abuse of discretion. Since there was no abuse of discretion, the Board's decision should not be changed. *South Prairie Construction Co. v. Local 627, International Union of Operating Engineers, supra.*

In *N.L.R.B. v. Burns International Security Services,* 406 U.S. 272 (1972), this Court found that, holding the union or the new employer to the substantive terms of an old collective bargaining agreement may be inequitable, and that, unless certain changes were made in the old agreement, investment in moribund industries may be discouraged. The Court goes on to say:

> Saddling such an employer with the terms and conditions of employment contained in the old collective bargaining contract may make these changes impossible and may discourage the inhibit the transfer of capital. On the other hand, a union may have made concessions to a small or failing employer that it should be unwilling to make to a large or economically successful firm. The congressional policy manifest in the Act is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities. Strife is bound to occur if the concessions that must be honored do not correspond to the relative economic strength of the parties.

Id., at 288. This passage indicates that both parties to a collective bargaining agreement will be affected by economic realities and marketplace fluctuations when they enter into an employee-employer relationship and that their subsequent negotiations will be affected by these conditions.

This Court's decision in *Howard Johnson Co. v. Detroit Local Joint Executive Board,* 417 U.S. 249 (1974), stands for the proposition that a successorship clause in a collective bargaining agreement cannot bind the successor where it is clear that the buyer refused to assume any obligations under the agreement. Armco has assumed all responsibilities under the old collective bargaining agreement except for the duty to bargain with OCAW. This notwithstanding, the Board found that Armco was a successor to Allied. Armco knew about its responsibilities in regard to the new plant and the new workers that were joining the corporation.

While Armco knew of its new responsibilities, it could not know with certainty what economic effect these new conditions would have on its operation. Armco knew there was a union involved and that there would be give and take in negotiations and that nothing was guaranteed. Likewise, the domestic steel market for the past few years has been sluggish at best. Armco knew that the economic "deal" it was getting by purchasing the coke facility was somewhat speculative given current market conditions.

Given the different concerns and community of interests that the workers in the coke plant had, including the long history of OCAW representation, and that coke production and steel manufacturing are, as even Armco admits,[6] different industries, the Company should have foreseen that possibly the future would not proceed according to its optimal economic plan. Armco's speculative financial strategy did not turn out as

[6] Armco Petition for Writ of Certiorari, p. 15.

favorable as projected. Changing economic and market conditions are part of the risks that all businesses take; they are not, however, sufficient reason to overturn a legitimate decision made by the Board. This Court should not grant the Writ since there has been no abuse of discretion.

IV. THE ISSUE PRESENTED TO THIS COURT BY PETITIONERS IS NOT PROPERLY BEFORE THE COURT BECAUSE IT IS OF ROUTINE CHARACTER AND HAS BEEN PROPERLY RULED ON BY THE N.L.R.B. AND THE COURT OF APPEALS ACCORDING TO WELL-ESTABLISHED PROCEDURES.

The N.L.R.B. has issued an untold number of decisions concerning the appropriateness of a bargaining unit, using established guidelines to determine whether a similar community of interests for a group of workers exists. The ALJ and the Board used the same criteria in this case and determined that the coke plan workers comprised an appropriate bargaining unit, one that is separate from the steel mill workers.

The courts have dealt with the question of arbitary and capricious decisions and abuse of discretion by administrative agencies on many, many occasions. This Court has ruled that an agency decision is arbitrary and capricious if the agency has relied on factors which congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *See, Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Company,* 463 U.S. 29 (1983). The Court of Appeals for the Sixth Circuit decided that, given the evidence of this case, the Board's decision was not arbitrary and

capricious and was based on substantial evidence on the record. There was no abuse of discretion.

The N.L.R.B. used the same guidelines in this case as it has used for all of the bargaining unit determination cases it has heard in the past. The Sixth Circuit did likewise when it reviewed the Board's decision. This is not a case where new law is to be made or where either the Board or the Court of Appeals has acted contrary to any previous decision issued by this Court. Nor does this Court have to clear up any confusion or conflict about what the current state of the law is. There is no reason why this Honorable Court should review this case. The Board's ruling and the Court of Appeals decision upholding this ruling should stand.

CONCLUSION

This case involves a routine administrative decision and review of that decision. The N.L.R.B. acted well within its jurisdiction and discretion when it determined that the coke plant workers had a distinct community of interests and were entitled to be a separate bargaining unit. The Court of Appeals for the Sixth Circuit found that the ALJ and Board considered a wide range of factors in making the determination and all decisions were based on substantial evidence on the record. As mentioned above, the Sixth Circuit's decision is consistent with that of the Seventh Circuit in *N.L.R.B. v. Indianapolis Mack Sales and Services, supra.* There is no conflict among the Circuit Courts, nor did either the Board or the Court of Appeals act contrary to any previous decisions issued by this Court. There is no new law to be made in this case. The Petition for Writ of Certiorari should be denied.

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Nos. 87-1514 and 87-1719

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARMCO INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

UNITED STEELWORKERS OF AMERICA, AFL-CIO
and its Local 1865,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

**REPLY OF PETITIONER ARMCO INC.
TO BRIEFS IN OPPOSITION**

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REPLY OF PETITIONER ARMCO INC. TO BRIEFS IN OPPOSITION

The Board's and OCAW's attempt to paint this case as one involving myriad small disputed judgments about myriad small disputed facts is a smokescreen that fails to conceal fundamental issues fully appropriate for decision by this Court. These issues are neither fact-bound nor unique to this case. They concern the proper influence in bargaining unit determinations of dramatic shifts in economic conditions, of undue leverage for a few hundred employees at the front end of a continuous production process employing thousands of employees, of defunct prior bargaining unit history in failed enterprises, and of decades of legal precedent and consistent industrial practice. In this particular case, the issues concern whether the Board's unit determination can be considered anything but unthinking and arbitrary when it draws no distinction between an independent coke plant, which is failing because it can sell only a small portion of the coke it can produce, and that coke plant, producing virtually at full capacity, as an element of a steel works. In the larger sphere, the issues concern whether in this age of industrial change the Board can properly shape the context of labor-management relationships on the basis of a wooden litany of unit determination criteria which fails to reflect or accommodate entirely new conditions brought about by the sale and acquisition of the particular unit.

In this case, the facts and circumstances which govern these issues are essentially undisputed. The post-acquisition operation of the Ashland Works is the same operation which exists in all other basic steel plants that include coke facilities and which has uni-

formly been recognized, in practice and by the Board, as a single bargaining unit. Thus, all the factors listed at Board Opp. 9 and 14 which are said by the Board to justify a separate unit are essentially the same factors which exist in all the many other basic steel plants that have coke operations, in every one of which coke is part of the larger unit. For example, as pointed out in the petition of United Steelworkers of America in No. 87-1719, at p. 9, n.7, dissimilar skills, duties and working conditions and limited employee interchange are characteristic of many departments of any basic steel plant but are much less persuasive of balkanization than functional integration is hostile to it. It follows that, at its core, the Board's position rests on giving controlling weight to a defunct past bargaining history in contravention of the strictures of §9(c)(5) of the statute and in conflict with the decision of the Seventh Circuit in *NLRB v. Indianapolis Mack Sales & Service, Inc.*, 802 F.2d 280 (1986).

The Board's answer to the "undue leverage" created by its unprecedented balkanization of the Ashland Works is extraordinary. The answer is to require Armco to revert to the open market in coke which Armco had gotten out of when it acquired the Allied plant.[1] Armco's whole purpose in acquiring the Allied plant and integrating it into the steel production process was to avoid open market purchases and stock-

[1] The Board says (Opp. 13): "In any event, the record in this case does not support the suggestion that the coke plant employees could shut down Armco's steel mill operations. Prior to the purchase of the [coke facility], Armco satisfied most of its coke needs through purchases on the open market. There is no reason to believe that it could not do so again."

piling because they are costly and inefficient and the quality of the coke so acquired is erratic and inadequate. The Board does not dispute that this was Armco's purpose, and it does not dispute that it was a legitimate and constructive purpose. Nevertheless the Board, in the interest of fractionalizing bargaining at the Ashland Works, would require Armco to abandon this purpose and revert to the wholly unsatisfactory vagaries of the open market.

This hugely impractical suggestion about the open market is of a piece with the Board's unrealistic statement (Opp. 10) that coke facilities which are part of integrated steel works are " 'nothing more than suppliers of a material used in steelmaking,' " like the Allied plant before the acquisition. The statement is an *ipse dixit* which fails to refute the undeniable fact that Armco has integrated the coke operation into the continuous steel production process, thereby creating the same single bargaining unit which exists in all the other integrated steel works that include coke.

The Board says *Mallinckrodt Chemical Works*, 162 NLRB 387 (1966), upsets the unbroken precedent and practice which require a single unit, including coke, in basic steel operations (Opp. 11, n.4). The Board is wrong. *Mallinckrodt* is not a balkanizing decision that encourages smaller units. It is the opposite ofthat. *Mallinckrodt* overruled *American Potash & Chemical Corporation*, 107 NLRB 1418 (1954), which had unduly exalted the claims of crafts for severance (162 NLRB at 396), except in four "favored" industries, including steel. Thus *Mallinckrodt* swung the pendulum back toward *more favorable treatment of large unit claims*, including consideration of the interests of all the employees in the facility. 162 NLRB at 396.

In the course of this *anti*-balkanization opinion the Board said that all factors should also be examined even in the favored industries, which were not before it. 162 NLRB at 398 n.17. But it did not thereby break up, or even destabilize, the single unit in the favored industries. In fact, the Board justified its ruling that the extant single unit in *Mallinckrodt* was not to be balkanized by equating the functional integration in that case with the functional integration in steel and other favored industries. (162 NLRB at 398).[2]

Following its clear indication in *Mallinckrodt* that it had no intention of actually balkanizing steel, the Board, in the 20 years since *Mallinckrodt*, has *never once* balkanized steel or any of the other favored in-

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[2] The two cases cited by OCAW (Br. 6) to support its contention that this case does not depart from precedent are inapposite. The first, NLRB v. Metal Container Corporation, 660 F.2d 1309 (8th Cir. 1981), upheld a separate craft unit for highly skilled, "production-support" employees. The production employees on the functionally integrated production line remained in a single unit. It has long been recognized in Board law that the special interests of highly skilled craft employees may warrant a separate unit.

The second case, Hamilton Test Systems, N.Y., Inc. v. NLRB, 743 F.2d 136 (2d Cir. 1984), did not involve a Company with an integrated manufacturing operation. Rather, the Company was a service organization with employees scattered in four separate locations. Most of the work was performed on an as-needed basis at the work sites of the Company's customers and most of the employees were on the road and reported to their respective offices only once a week largely for administrative purposes. In short, there is no rational basis to apply the community of interest principles which governed Hamilton Test Systems to the highly integrated production employees at Armco's Ashland Works.

dustries, until it did so in this case. There is not one post-*Mallinckrodt* case in or out of steel that is consistent with the Board's two-unit decision for Armco's fully integrated Ashland Works. *Mallinckrodt* said nothing, and since *Mallinckrodt* the Board has done nothing until this case, to suggest that an appropriate separate coke department unit can exist in an integrated steelmaking facility. Thus, the essence of the Board's decision in this case is gratuitously to declare that factors which for decades have been understood not to balkanize steel may now be cited to balkanize it, all in the interest of allowing the defunct bargaining history to control.

The Board's opposition (at 14, 16) also relies on references to the perspective and expectations of employees in *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. ___, 96 L Ed 2d 22, 107 S Ct 2225 (June 1, 1987). But in *Fall River*, in contrast to this case, there was no question of change in the appropriate unit. Leverage was not an issue at all in *Fall River*, much less leverage by a small group of employees over a whole vast productive enterprise of which it had become a part, and over the thousands of employees in that enterprise. Contrary to the last statement in the Board's opposition, *Fall River* did not rule that employees' past bargaining unit status takes precedence over leverage, since leverage and the balkanization of an integrated unit were not issues there. The Board's attempt to apply the reference in *Fall River* to "legitimate expectations in continued representation by their union" (96 L Ed 2d at 38) to the different situation in this case is further proof that the decisions of the Board and the Court of Appeals come down to past bargaining history ov-

erriding the single unit which the integration of the coke facility into the continuous steelmaking process created.

The Board cursorily dismisses (Opp. 15) petitioners' position that the economic realities of this situation must be taken into account to assess correctly the community of interest which determines the appropriate unit question. The Board says that to give "decisive weight" to this factor would undermine §9(b)'s statement that "to assure to employees the fullest freedom in exercising" their statutory rights a less than plant-wide unit is among the permissible choices. But the Board gave the economic realities of the case no weight, much less decisive weight. And the Board's and the industry's long history of single-plant units, including integrated coke operations, in basic steel, shows that the determination has long since been made in the steel industry that the fullest freedom for exercise of employee rights is in a plant-wide unit. That determination was defied in this case and, in consequence, the basic constructive purpose of the coke plant purchase has been upset, undue leverage over steel works operations has been given to a relatively small group of employees, and long-term constructive precedent has been replaced with a new precedent which, if upheld, will discourage job-saving investment in basic steel and other domestic industry.

CONCLUSION

For the reasons stated in the petitions and this reply, the petitions for certiorari should be granted.

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